TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902. 1904.

No. 92. 93.

M. H. COURTNEY, APPELLANT,

vs.

LOUIS A. PRADT, EXECUTOR OF MERRIT S. ATWATER, DECEASED, AND WILLIAM C. ATWATER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY.

FILED JULY 27, 1903.

(19,022.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

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M. H. COURTNEY, APPELLANT,

vs.

LOUIS A. PRADT, EXECUTOR OF MERRIT B. ATWATER, DECEASED, AND WILLIAM C. ATWATER.

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1 Proceedings in the circuit court of the United States for the sixth judicial circuit and eastern district of Kentucky, at a regular term begun and held at the Federal court hall in the city of Covington, April 6th, A. D. 1903.

Court met
Present: Honorable A. M. J. Cochran, judge.

M. H. COURTNEY
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, & Wm. C. Atwater. } # 2316.

Be it remembered that heretofore, to-wit, on Tuesday April 8th A. D. 1902, an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 419.

This day came the defendants, by R. D. Hill, their attorney and, in open court, filed a transcript of the proceedings had herein in the Powell circuit court, and, on his motion, said case is placed upon the equity side of the docket of this court.

And on the same day, to-wit, on April 8th A. D. 1902, the transcript from the Powell circuit court, mentioned in the foregoing entry was filed herein which was and is in words and figures following, to-wit:—

2 Powell Circuit Court.

M. H. COURTNEY
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, and William C. Atwater. } Petition in Equity.

The plaintiff, M. H. Courtney, states that during the year 1890 and prior thereto, Meritt B. Atwater and defendant, William C. Atwater, were partners trading and doing business under the firm name of M. B. Atwater & Company. That prior to the 10th day of December, 1890, this plaintiff at the special instance and request of said firm of M. B. Atwater & Company rendered to said firm divers valuable services.

Plaintiff states that on the 10th day of December, 1890, said firm of M. B. Atwater & Company was indebted to the plaintiff in a large sum of money for said services rendered by plaintiff and that there was an honest difference in the amount claimed by this plaintiff to

be due him from said firm and the amount claimed by said firm to be due from them to plaintiff, plaintiff claiming more than defendants were willing to admit.

Plaintiff states that in order to settle their said differences and to compromise and adjust said amount satisfactorily to said firm and to plaintiff, the said Merritt B. Atwater and William C. Atwater, partners as aforesaid, made a proposition in writing to this plaintiff, by a letter of that date in which they proposed to give plaintiff in satisfaction of the indebtedness of said firm to him, capital stock in the Atwater & Fair Lumber Company, a corporation created in Wisconsin, of the par face value of five thousand ($5,000.00) dollars with a guarantee that it was worth eight thousand dollars ($8,000.00) and that said firm would take said stock, at the end of that season's cut, and pay plaintiff therefor the sum of eight thousand dollars ($8,000.00) in cash.

3 Plaintiff states that he accepted said proposition by letter which he wrote shortly after receiving same, which was on or about the 12th day of December, 1890. Plaintiff states that the letter containing said proposition for said firm of M. B. Atwater and Company was received by him in Clay City, Kentucky, and that his said letter of acceptance was mailed by him in Clay City, Kentucky, to said firm, and was duly received by them, and, that plaintiff, at the time of receiving and accepting said proposition was a citizen and resident of the State of Kentucky, and plaintiff is now a citizen and resident of said State of Kentucky.

Plaintiff states that, at the end of said season's cut he demanded of said firm that they should comply with their said proposition and pay him said eight thousand dollars, but plaintiff states that said firm wholly failed to carry out their agreement and wholly failed to transfer or give to him said stock in said Atwater and Fair Lumber Company, and wholly failed to pay him said eight thousand dollars, or any part thereof.

Plaintiff states that said letter containing said proposition to him will be filed as part hereof, if required, but the letter which he wrote, accepting said proposition, and which was received by said M. B. Atwater and Company cannot be filed herewith, because it is not in plaintiff's possession.

Plaintiff states that, at various times after said contract was made the said Merritt B. Atwater and William C. Atwater ratified same and promised this plaintiff to carry out its provision and to pay plaintiff said eight thousand dollars, as agreed therein, but plaintiff says that no part thereof has ever been paid.

Plaintiff states that on, to-wit the — day of —— 1898, the said Merritt B. Atwater departed this life having made and executed his last will and testament by which he appointed the defendant, Louis A. Pradt, his executor; that said will was duly probated by the county court of Marathon county, in the State of Wisconsin,

4 and that said Louis A. Pradt duly qualified there as executor of said Merritt B. Atwater, deceased, and is now acting as such executor.

Plaintiff states further that the Atwater and Allen Land & Lumber Company is a corporation duly created by and organized under the laws of the State of Wisconsin, with power to buy, sell, own and hold real estate in the State of Kentucky, and, that prior to August, 1901, said corporation did buy and own real estate in the State of Kentucky and, practically all of its assets consisted of real estate in the said State of Kentucky. Plaintiff states that during the month of August, 1901, said corporation sold its said real estate and realized a large sum of money therefor, and that practically the only business ever done by said corporation was to buy, own, hold and sell said real estate in the State of Kentucky.

Plaintiff states that Merritt B. Atwater, at the time of his death, owned stock in said corporation and plaintiff states that said corporation now owes to the defendant, Louis A. Pradt, executor of Merritt B. Atwater, deceased, a large sum of money as such executor. That the chief office and place of business of said corporation in the State of Kentucky is in Clay City, Powell county, Kentucky, and, that said corporation has an agent resident there, upon whom a summons can be served.

Plaintiff states that said defendant, Louis A. Pradt, executor of said Merritt B. Atwater, deceased, is a non-resident of this State, and believed to be absent therefrom. That he resides and may be found in the city of Washington, District of Columbia, and that said city of Washington, District of Columbia is the name of the place wherein a post-office is kept nearest to the place where said defendant resides and may be found.

Plaintiff further states that the nature of his claim herein is for a debt demand arising upon an express contract—that it is just and plaintiff believes that he ought to recover from the defendants the sum of eight thousand dollars with interest thereon at the rate of six per cent. per annum from the 1st day of November 1891, until paid; said date being after the end of said season's cut and after plaintiff had made the aforesaid demand.

5 Plaintiff files herewith, as part hereof, his separate affidavit verifying said claim, as required under section 2870 of the Kentucky Statutes.

Plaintiff knows of, and states, that there are no other creditors in the State of Kentucky of the said Merritt B. Atwater, deceased, and plaintiff states that there are assets in the hands of Louis A. Pradt, executor of Merritt B. Atwater, deceased, and assets of the estate of Merritt B. Atwater, deceased, in the State of Wisconsin, exclusive of the stock held by him in said corporation and exclusive of indebtedness of said corporation to said executor, more than sufficient in value to pay all the debts of said estate, owing to creditors of said Merritt B. Atwater, outside of the State of Kentucky.

Plaintiff states that the said Merritt B. Atwater, by his will, after devising to his daughter, Charlotte R. Pradt, his residence in the city of Wausau, Wisconsin, and to Sarah Downs—one thousand dollars ($1,000.00) and to defendant, William C. Atwater, all of his right, title and interest in and to the Seamless Structural Company of Mil-

waukee, Wisconsin—bequeathed and devised the rest and residue of his estate, real, personal and mixed, to his wife, Charlotte Atwater for and during the period of her natural life, and, after her death, he bequeathed and devised to the defendant, William C. Atwater, an undivided one-sixth interest in said rest and residue of his said estate.

Plaintiff states that the said capital stock, held by the said Merritt B. Atwater in the Atwater and Allen Land and Lumber Company constitutes a part of said rest and residue of his said estate, and, that the defendant, William C. Atwater, has an equitable interest therein.

Plaintiff states that the said Charlotte Atwater departed this life on to-wit the — day of —— 1899.

6 Plaintiff states that the said defendant, William C. Atwater, is a non resident of this State and believed to be absent therefrom; that he resides and may be found in the city of Chicago, State of Illinois and that said city of Chicago, State of Illinois, is the name of a place wherein a post office is kept nearest to the place where said defendant resides and may be found.

Plaintiff states that said William C. Atwater is insolvent; that the said will of Merritt B. Atwater has not been probated in Kentucky and, that it would be unjust and inequitable to this plaintiff to permit said executor to collect, or withdraw, any of said assets arising from the said real estate in Kentucky and distribute them under said will in a foreign jurisdiction until after plaintiff's claim against the estate of Merritt B. Atwater, deceased, and against said William C. Atwater, is paid in full and that unless an attachment is granted plaintiff herein and said assets attached and subjected by the court to plaintiff's claim herein they will be collected by said executor and withdrawn from the jurisdiction (of this State and distributed in a foreign jurisdiction) and plaintiff will be without remedy.

Wherefore, plaintiff prays for judgment against the defendant, Louis A. Pradt, executor of Merritt B. Atwater deceased, and William C. Atwater, and each of them, for the sum of eight thousand dollars, with interest thereon at the rate of 6 *% cent.* per annum from the 1st day of November, 1891, until paid and for his costs herein and prays for a general attachment against the property of said defendants, including debts owing to them, or either of them, and any choses in action, stocks, legal or equitable interests they may have in stock or other property and that the same, when attached may be subjected and applied to the satisfaction of plaintiff's claim herein, and further prays for all (general,) equitable and proper relief.

W. B. DIXON,
Att'y for Plaintiff.

7 M. H. Courtney says the statements contained in the foregoing petition are true.

M. H. COURTNEY.

Subscribed and sworn to before me by M. H. Courtney this 25th day of September, 1901.

A. H. NORTON,
Clerk Powell Circuit Court.

The affiant, M. H. Courtney, states that prior to the 10th day of December, 1890, at the special instance and request of M. B. Atwater and William C. Atwater, partners composing the firm of M. B. Atwater and Company, he rendered divers services to said firm and that said firm being indebted to him did, by letter, dated the 10th day of December 1890 propose to him in writing to give him in satisfaction of the said indebtedness of said firm to him, capital stock in the Atwater and Fair Lumber Company, a corporation created in Wisconsin, of the par face value of five thousand dollars, with a guarantee that it was worth eight thousand dollars, and that said firm would take said stock at the end of that season's cut and pay affiant therefor the sum of eight thousand dollars in cash.

Affiant states that he wrote a letter to said firm on or about the 12th day of December, 1890, which letter was duly received by said firm and, in which he accepted said proposition.

Affiant says that, at the end of said season's cut, he demanded of said firm that they should comply with their said proposition and pay him said eight thousand dollars—but affiant says that said firm wholly failed to carry out their said agreement and wholly failed to transfer, or give him, said stock, in said Atwater & Fair Lumber Company and wholly failed to pay him said eight thousand dollars, or any part thereof, and that no part thereof has ever
8 been paid and that the estate of said M. B. Atwater is indebted to him in said sum of eight thousand dollars with interest thereon at the rate of six per cent. per annum from the first day of November, 1891, until paid. That his said demand is just and has never, to his knowledge or belief, been paid and that there is no off-set nor discount against the same or any usury therein.

M. H. COURTNEY.

Subscribed and sworn to before me by M. H. Courtney this 25th day of September, 1901.

A. H. NORTON, *Clerk.*

The defendant, Louis A. Pradt, executor of Merritt B. Atwater and the defendant, William C. Atwater, are hereby warned to appear in the Powell circuit court at the March term, 1902, and defend the above styled action and M. A. Phillips, a regular practicing attorney of this bar, is appointed corresponding attorney for the non-residents herein and, being present, accepted said appointment.

Given under my hand as the clerk of the Powell circuit court this September the 25th, 1901.

A. H. NORTON, *Clerk.*

Attachment Bond.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Defendant. } Attachment Bond.

We undertake that the plaintiff, M. H. Courtney, shall pay to the defendant, Louis A. Pradt, executor of M. B. Atwater, and William C. Atwater, the damage not exceeding twenty-five thou-
9 sand six dollars which they may sustain by reason of the attachment in this action—if the order thereof is wrongfully obtained.

Witness our hands, this 25th day of September, 1901.

M. H. COURTNEY.
A. W. SPOTSWOOD.

Taken and subscribed in presence of
A. H. NORTON, *Clerk.*

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, and William C. Atwater, Defendants. } Order of Attachment.

The Commonwealth of Kentucky to the sheriff of Powell county:

You are commanded to attach and safely keep the property of the defendants, Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater, in your county not exempt from execution or so much thereof as will satisfy the claim of the plaintiff in this action for twelve thousand eight hundred dollars ($12,800.00) and $100.00 for the cost of the action and to summons the Atwater and Allen Land and Lumber Company—the garnishee—to answer herein on the 1st day of the next March
10 term of the Powell circuit court, and make due return on this order on that day.

Witness, A. H. Norton, clerk of said court, this 25th day of September, 1901.

A. H. NORTON,
Clerk P. C. C.

To the Atwater & Allen Land and Lumber Company:

The object of this action is to attach any money owing by you to the defendants or either of them and to prevent you from paying to them, or either of them, or to any one for them, and to compel

you to answer as garnishee herein and hold said money subject to the order of the court—and further to attach the capital stock in said Atwater & Allen Land and Lumber Company belonging to defendants, or either of them and any legal or equitable interest of the defendants therein.

W. B. DIXON,
Att'y for Plaintiff.

Came to hand September 25th, 1901 at 6.30 p. m.
T. B. WARE, *S. P. C.*,
By J. M. WELCH, *D. S.*

Executed the within attachment on the Atwater and Allen Land and Lumber Company by delivering to Edward Rhubusky, the duly appointed agent of said Atwater & Allen Land and Lumber Company a copy of the within attachment, and summoning said Atwater — Allen Land and Lumber Company to answer as garnishee this September 25th, 1901.

T. B. WARE, *S. P. C.*
J. M. WELCH, *D. S.*

11 Powell Circuit Court, March Term, 19" Day of March, 1902.

M. H. COURTNEY, Plaintiff,
v.
L. A. PRADT, &c., Defendants.
} Answer of Garnishee Atwater.

(Filed March 19th, 1902. A. H. Norton, Clerk.)

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
L. A. PRADT, Executor of Merrirr B. Atwater & Wm. M. Atwater, Dec'd, Defendants.
} Answer of Garnishee Atwater & Allen Land & Lumber Company.

The Atwater and Allen Land and Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin, summoned herein as garnishee, says that said M. B. Atwater in his life time owned two hundred and fifty shares of the capital stock of said company of the par value of $45.00 per share, and owned said two hundred and fifty shares at the time of his death and that said shares now stand on the book of said company in the name of said M. B. Atwater and now held by L. A. Pradt who is the executor of the estate of the said M. B. Atwater.

That, on the 30th day of August, A. D. 1901 a dividend was declared by the directors of said company at a meeting held on that date.

12 That the indebtedness to said Pradt, as executor of said M. B. Atwater, deceased, on account of said dividend is $4,757.37 and that said amount is being held by the Atwater

& Allen Land and Lumber Company, awaiting the decision of this court.

Said Atwater & Allen Land and Lumber Company does not owe anything to said W. C. Atwater who is now a stockholder in said company.

That said W. C. Atwater has not been a stockholder in said company since the year 1893 and was not a stockholder at the time of the declaration of said division on the 30th day of August A. D. 1901.

ATWATER & ALLEN LAND & LUMBER COMPANY,
[SEAL.] By WASHINGTON BECKER, *President.*

Washington Becker says that he is president of the Atwater and Allen Land and Lumber Company and that statements in the foregoing answer are true.

WASHINGTON BECKER. [SEAL.]

STATE OF WISCONSIN, } ss:
County of Milwaukee, }

Subscribed and sworn before me this 17th day March 1902.
E. H. WILLIAMS,
Milwaukee County, Wisconsin.

My commission expires August the 17th, 1902.

13 STATE OF KENTUCKY:

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, and William C. Atwater, Defendants.

Petition for Removal to the Circuit Court of the United States for the Eastern District of Kentucky.

Your petitioners Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater respectfully show to this honorable court that they are the defendants in this suit, which is of a civil nature and that the matter and amount in dispute in this cause exceeds the sum or value of two thousand dollars ($2,000.00) exclusive of interest and costs and that the controversy herein is wholly between citizens of different States; that the plaintiff, M. H. Courtney, was, at the time of the commencement of this suit, and still is, a citizen of the State of Kentucky—residing at Clay City, in said State and that your petitioner, Louis A. Pradt, executor of Merritt B. Atwater, deceased, was, at the time of the commencement of this suit,

and still is, a citizen of the State of Wisconsin and of no other State—residing in the city of Wasau, in said State, and your petitioner, William C. Atwater was, at the time of the commencement of this suit, and still is a citizen of the State of Illinois and of no other State—residing in the city of Chicago, in said State, and that your

14 petitioners desire to remove this cause before the trial thereof, into the next circuit court of the United States to be held in the eastern district of Kentucky, and your petitioners offer herewith good and sufficient surety for their entering in the circuit court of the United States for the eastern district of Kentucky, first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioners therefore pray that the said surety and bond may — accepted. That this suit may be removed to the next circuit court of the United States to be held in the eastern district of Kentucky, pursuant to the statutes of the United States in such cases made and provided and that no further proceedings may be had herein in this court—and they will ever pray.

WM. C. ATWATER,
LOUIS A. PRADT,
Petitioners.

R. D. HILL,
Attorney for Petitioners.

CITY OF WASHINGTON, *District of Columbia,* } ss:

Louis A. Pradt, executor of Merritt B. Atwater, deceased, makes oath and says that he is the petitioner above mentioned; that the statements of the foregoing petition are true to his own knowledge.

LOUIS A. PRADT.

Subscribed and sworn to before me this 3rd day of March, 1902.

E. C. BRANDENBURG,
Notary Public, D. C.

15 R. D. Hill says he is attorney for the foregoing named Louis A. Pradt, executor of Merritt B. Atwater and William C. Atwater both of whom are absent from Kentucky; that the statements of the foregoing petition are true as he believes.

R. D. HILL.

Sworn to before me by R. D. Hill March 21st, 1902.

A. H. NORTON, *Clerk.*

STATE OF KENTUCKY:

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Dec'd, and William C. Atwater, Defendants. } Bond on Removal.

Know all men by these presents, that we, Louis A. Pradt, executor of Merritt B. Atwater, deceased, of the city of Wasau, Wisconsin, and William C. Atwater of Chicago, Illinois, as principal and R. D. Hill, of the city of Louisville and State of Kentucky, as surety, are holden and stand firmly bound unto M. H. Courtney in the penal sum of one thousand dollars ($1,000.00) for the payment whereof well and truly to be made unto the said M. H. Courtney, his heirs, representatives and assigns, we bind ourselves, our heirs and
16 assigns jointly and firmly by these presents. Upon condition nevertheless that whereas the said Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater have filed their petition in the Powell circuit court for the removal of a certain cause therein pending wherein the said M. H. Courtney is plaintiff and the said Louis A. Pradt executor of Merritt B. Atwater, deceased, and William C. Atwater are defendants to the circuit court of the United States for the eastern district of Kentucky.

Now, if the said Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater shall enter in the circuit court of the United States for the eastern district of Kentucky on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or impropery removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

In witness whereof, we, the said Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater and R. D. Hill have hereunto set our hands and seals this 21st day of March, 1902.

LOUIS A. PRADT,
Executor of Merritt B. Atwater. [SEAL.]
WILLIAM C. ATWATER, [SEAL.]
By R. D. HILL, *Attorney.*
R. D. HILL. [SEAL.]

STATE OF KENTUCKY, }
County of Jefferson, } *ss:*

R. D. Hill makes oath that he resides in the city of Louis-
17 ville, county of Jefferson and State of Kentucky; that he is a free holder in said State and is worth the sum of $5000.00 over and above all property exempt from sale on above execution.

R. D. HILL.

Subscribed and sworn to before me this 21st day of March 1902.
A. H. NORTON, *Clerk.*

STATE OF KENTUCKY:

Powell Circuit Court.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Deceased, } Order.
Defendants.

The defendants herein, Louis A. Pradt, executor of Merritt B. Atwater, deceased, and Wm. C. Atwater, this day filed their petition for removal of this cause to the circuit court of the United States for the eastern district of Kentucky, and having at the same time offered their bond in the sum of $1000.00 with R. D. Hill—good and sufficient surety, pursuant to statute and conditioned according to law.

Now, therefore, this court does hereby accept and approve said bond and accept said petition and does order that this cause be removed for trial to the next circuit court of the United States for the eastern district of Kentucky, pursuant to the statutes of the
18 United States and that all other proceedings of this court be stayed.

STATE OF KENTUCKY, } *sct:*
County of Powell, }

I, A. H. Norton, clerk of the Powell circuit court do hereby certify that the above is a true and complete copy of the pleadings and exhibits and order of transfer and bond in the above styled action as appears of record in my office.

Given under my hand as clerk of said court this April 3rd, 1902.
A. H. NORTON,
Clerk Powell Circuit Court.

And, on a day following, to-wit, on April 21" A. D. 1902 answer of corresponding attorney was filed herein which was and is in words and figures following, to-wit:—

The Circuit Court of the United States for the Eastern District of Kentucky.

M. H. COURTNEY
v.
LOUIS A. PRADT, &c. } Answer of Corresponding Attorney.

For answer herein say that on the 25th day of September 1901. your undersigned was appointed by the clerk of the Powell cir-

cuit court, upon the filing of the suit herein corresponding
19 attorney for the non-residents, Louis A. Pradt and William C. Atwater that, after said appointment said petition was copied and together with a letter notifying said non-residents of the suit filed, and asking what defense, if any, they had to said action, and no defense being communicated from would ask that all be admitted to their interest, and everything be denied to their prejudice, and that their interest be protected throughout this litigation, and that the undersigned be allowed by this court a reasonable fee for his services rendered herein not to exceed one hundred dollars.

M. A. PHILLIPS,
Corresponding Att'y.

And on a day following, to-wit: on September 9" A. D. 1902 notice of motion to dismiss was filed herein which was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

M. COURTNEY
v.
L. A. PRADT ET AL.

William B. Dixon, Esq., counsel for above-named plaintiff, is hereby notified that on Tuesday, the ninth day of September, 1902, defendants, Louis A. Pradt, executor of Merritt B. Atwater, and William C. Atwater will, at Covington, Kentucky, before said court, appearing for that purpose only, file a written motion in the above styled case, that said case be then and there dismissed for want of jurisdiction in said court to try same; and said defendants will also, at said time and place, file their demurrer to the jurisdiction
20 of the court, and ask that said motion be submitted and at once heard.

R. D. HILL,
Counsel for Defendants.

Service of above notice accepted this September 20", 1902
W. B. DIXON,
Att'y for Pl'ff.

And on the same day, to-wit: on September 9" A. D. 1902 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "I," page 530.

This day came the plaintiff, by W. B. Dixon, and moved to remand this cause to the State court whence it was removed.

The court, not being advised, takes time and said motion is submitted. Came the defendants, by R. D. Hill, their attorney, and

filed special demurrer and motion to dismiss bill for want of jurisdiction. The court, not being advised, takes time and said motions are submitted. Counsel on both sides are given thirty days in which to file briefs.

And on the same day, to-wit: September 9" A. D. 1902 motion to remand was filed herein which was and is in words and figures following, to-wit:

United States Circuit Court, Sixth Circuit & Eastern District of Kentucky.

M. H. COURTNEY
v.
LOUIS A. PRADT, Ex'r. } Motion.

21 The plaintiff, M. H. Courtney, moves the court to remand this case to the State court from whence it was removed.

BRECKINRIDGE & SHELBY &
W. B. DIXON, *Att'ys for Pl'ff.*

And, on the same day, to-wit: on September 9" A. D. 1902 motion was filed herein which was and is in words and figures following, to-wit:—

In the United States Circuit Court, Eastern District of Kentucky.

M. COURTNEY, Plaintiff,
v.
L. A. PRADT ET AL., Defendants. } Motion.

The defendant, L. A. Pradt, executor of Merritt B. Atwater and William C. Atwater, entering their appearance herein for the purpose of this motion only, move the court to dismiss this cause for the want of jurisdiction to try same.

——— ———,
Attorneys for Defendants.

And, on the same day, to-wit: on September 9" A. D. 1902 special demurrer was filed herein which was and is in words and figures following, to-wit:—

22 In United States Circuit Court, District of Kentucky.

M. H. COURTNEY, Plaintiff,
v.
L. A. PRADT ET AL., Defendants. } Special Demurrer.

The demurrer of L. A. Pradt, executor of the estate of Merritt B. Atwater, deceased, one of the above named defendants to the bill of complaint in this action, is as follows:

This defendant, by protestation not confessing any or all of the matters or things in the plaintiff's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer showeth;

First. That the court has no jurisdiction of the person of this defendant.

Second. That the court has no jurisdiction of the subject matter of the action.

Third. That the complaint does not state facts sufficient to constitute a cause of action.

Fourth. That it appears upon the face of the said bill of complaint that this action was not commenced within the time limited by law; to-wit; within the time limited by —.

Fifth. That the plaintiff is not entitled upon said bill to the relief he prays for because he has a plain and adequate remedy at law.

Sixth. That the plaintiff hath not in and for his said bill stated such a case as entitled him in a court of equity to any discovery from this defendant or to any relief against him as to the
23 matters contained in the said bill of complaint or any of such matters, and that said bill doth not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against this defendant.

Wherefore, and for divers other good causes of demurrer appearing in said bill, this defendant doth demur thereto and humbly demands the judgment of this court whether he shall be compelled to make any further or other answer to said bill, and prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

R. D. HILL,
Counsel for the Defendant L. A. Pradt.

I hereby certify that I am a solicitor and of counsel for the defendant, L. A. Pradt, in the above entitled cause, and, that in my opinion the foregoing demurrer of L. A. Pradt, executor of the estate of William B. Atwater, deceased, defendant to the bill of complaint of M. H. Courtney, complainant, is well founded in point of law and proper to be filed in the above cause.

R. D. HILL,
Solicitor & of Counsel for Defendant L. A. Pradt.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

R. D. Hill, being duly sworn, deposes and says, that the foregoing demurrer is not interposed to delay the cause or any proceedings therein.

R. D. HILL.

Subscribed and sworn to before me this 9th day of September, A. D. 1902.

JOS. C. FINNELL,
Clerk U. S. Courts.

24 And on a day following, to-wit on January 19" A. D. 1903 an opinion was filed herein which was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

M. H. COURTNEY, Plaintiff,
—.
LOUIS A. PRADT, Executor of Merritt B. Atwater, Dec'd, & William C. Atwater, Defendants. } Opinion.

This is a suit by a creditor of a partnership, one of whose two members is dead, against his executor and the surviving partner seeking to obtain payment of his debt. Both of defendants are non-residents of this State and were so when the suit was brought. The decedent was likewise a non-resident at the time of his death and the defendant executor was appointed and qualified as such in the State of decedent's domicile, to-wit: the State of Wisconsin. The suit was brought originally in the Powell circuit court and has been removed to this court by the defendants on the ground of diversity of citizenship. Each defendant was brought before the State court by constructive service of process and neither entered his appearance to the suit. An attachment was sued out and levied on stock owned by the decedent in a Wisconsin corporation, doing business in this State, and an indebtedness on the part of said corporation to him by serving the writ of attachment upon its agent in this State designated in accordance with the requirement of sec. 571 Ky. Stat. It was not levied upon any property of the surviving
25 partner the other defendant. It is therefore, a suit to subject the stock in and claim against said foreign corporation to the payment of said indebtedness by means of this attachment.

The defendants move to dismiss the suit because its predecessor, the State court, acquired no jurisdiction by virtue of the proceedings had therein of the subject matter of the suit or the persons of defendants.

It is certain that the State court had no jurisdiction so far as William C. Atwater, the surviving partner was concerned unless it had jurisdiction of the suit as against the foreign executor of the deceased partner. It is not alleged that William C. Atwater has any property in this State and the attachment has not been levied upon any property of his, save so far as he may be interested in the property levied on as the property of the deceased partner. The suit should be treated, therefore, as if it were a suit against the foreign executor alone.

It is claimed by defendants that the State court acquired no jurisdiction of the suit so far as said defendant was concerned upon two grounds. One is that by reason of the fact that the garnishee is a foreign corporation, the decedent's stock in and claim against it is not subject to attachment and subjection to payment of plaintiff's

indebtedness against the partnership in the courts of the State. The case of

N. J. Sheep & Wool Co. *v.* Traders Deposit Bank 104 Ky. 90

seems to support the defendant's position as to the stock and the case of

Pittsburg C. C. & St. L. R'y Co. *v.* Bartels 21 Ky. L. R. 1670

seems to be against their position as to decedent's claim against the foreign corporation. The case is attempted to be distinguished from this case on the ground that the foreign corporation there had property in this State and had been served with the writ of attachment in accordance with section 203 of the Civil Code, whereas the
26 foreign corporation here has no property in this State and was served with the writ of attachment in accordance with sec. 571 Ky. Statute-. To say the least, I doubt whether either or both of these considerations are sufficient to differentiate that case from this and there is room for claiming, irrespective of that case, that if the State court has jurisdiction of a suit against a foreign corporation on behalf of decedent or his estate it also has jurisdiction of a suit on behalf of a creditor of decedent seeking to subject decedent's claim against the corporation to payment of his debt, or in other words, that the fact that the foreign corporation is liable to be sued in this State was sufficient to give its indebtedness a situs in this State for purpose of garnishment in the courts thereof.

I do not find it necessary to commit myself further as to this ground upon which it is claimed by defendants the State court had no jurisdiction of this suit.

The other ground is that because the claim garnisheed is a decedent's estate it was not subject to attachment. I confess that at first I was clearly of the opinion that the position was well taken. The argument of counsel for plaintiff, however, has a tendency to bring me to the conclusion that it is not. It is that the statutory provisions requiring a rateable distribution of a decedent's estate amongst his creditors do not have the effect of prohibiting a creditor from suing and obtaining an attachment before judgment and execution after judgment by which he will secure a preference. The only way in which such preference can be prevented is by suit in equity to settle the estate and an injunction against the institution or prosecution of such a suit. As to the correctness of the contention of plaintiff's counsel in this particular I do not find it necessary to commit myself. Likewise as to his contention that with-
27 out an attachment plaintiff had a right upon constructive service alone to subject the foreign corporation's indebtedness to payment of plaintiff's claim. It would seem, however, that if this is so the foreign corporation should have been made a defendant. And, as bearing on the question see Judge Bullitt's note to sec. 418 of Civil Code.

The reason why I have not found it necessary to dispose of these contentions of counsel more definitely, is, that there is one ground upon which it can be claimed without question the State court had no

jurisdiction of the suit as against the defendant executor and hence not at all and that ground is that he is a foreign executor. The law in regard to the right of foreign representatives of decedent's estate to sue and be sued in other jurisdictions than those in which they were appointed is thus stated by Mr. Justice Story in

Vaughn *v.* Northrup 15 Pet. 1—

"It has become an established doctrine that an administrator appointed in one State cannot in his official capacity sue for any debts due to his intestate in the courts of another State and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debt due there by his intestate."

This law has been recognized and applied in this Commonwealth. Because of it, it has been held that a foreign personal representative could not sue to recover a debt due the decedent without complying with the terms of sec. 3878 & 3879 Ky. Stat.

Marrett *v.* Babb 91 Ky. 88

And that a foreign personal representative could not sue at all in this State to recover an asset of the estate which did not constitute a debt due the decedent

Maysville St. R. R. & T. Co. *v.* Marvin 59 Fed. 91
L. & N. R. R. Co. *v.* Brantley 96 Ky. 297

28 That a suit cannot be brought in this State against a foreign personal representative is expressly decided in the case of

Smith *v.* Baker 3 Met. 264

It is true that this suit is against him to subject an asset claimed to have a situs in this State. But that can make no difference. The resident creditors of a non-resident decedent have ample provision made for subjecting assets having a situs in the State to the payment of their debts. They can obtain administration on the decedent's estate in this State and then those assets. And the foreign personal representative cannot sue at all for some and for those for which he can sue he is required to give bond that will protect local creditors. It is, therefore, not necessary in order to protect them that such a novel proceeding as a suit against the foreign personal representative should be upheld. I am not aware of any authority justifying such a proceeding.

It seems to me, therefore, that the motion to dismiss the suit because of want of jurisdiction in the State court to entertain a suit should be sustained. There is no doubt that if such want of jurisdiction exists this court has the power to dismiss the suit. I am not bound to remand the case and let the State court determine the question. By reason of the diversity of citizenship and compliance with the removal statutes this court has acquired the right to determine that question and to act accordingly.

But, it is contended by counsel for plaintiff that the case was not removable within the principle applied in the case of

Cates *v.* Allen 149 U. S. 451

and should, therefore, be remanded. He has made motion to that effect upon this idea. But this case does not come within the case of Cates *v.* Allen. That was a suit in a State court of Mississippi brought by a creditor attaching an alleged fraudulent conveyance of his debtor. He had not obtained a judgment
29 and return of no property found. A statute of Mississippi authorized the suit without such preliminary action. A suit in equity cannot be brought without it. The case was removed to the Federal court. It was held by the Supreme Court that the case should be remanded because it was not a suit in equity within the removal statute and the State court under the statute had jurisdiction of it. If such a suit as that brought herein is maintainable it is a suit at law. The mere fact that an attachment is sued out in it does not make it a suit in equity. The early attachment statutes of Kentucky may have provided that the suit should be in equity. But the present attachment statutes do not so provide and they more frequently find application in actions at law than in suits in equity. And, even if it were a suit in equity the case of Cates against Allen is not an authority against the posision that the Federal court would have jurisdiction in equity in such a case. It would seem to come within the case of

Holland *v.* Challen 110 U. S. 15 and similar cases.

The motion to remand is therefore over-ruled.

As the position taken in regard to this being a suit against a foreign executor and hence not maintainable has not been considered by counsel for plaintiff in his brief he will have an opportunity to be heard in regard thereto if he so desires.

A. M. J. COCHRAN, *Judge.*

January 19", 1903.

30 And, on a day following, to-wit: on April 21" A. D. 1903 an opinion was filed herein which was and is in words and figures following, to-wit:—

United States Circuit Court, Eastern District of Kentucky.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, Ex'or, &c., Defendants. } 2nd Opinion.

Counsel for plaintiff have availed themselves of the leave granted them in the former opinion to be heard as to the position taken therein that this suit cannot be maintained because it is against a foreign executor and contend that that position is not well taken. In support of their contentions they cite the following decisions of the court of appeals of Kentucky to wit:—

Keiningham *v.* Keiningham, 71 S. W. 497
Davis *v.* Connelly, ex'r 4 B. M. 136

And the following decisions elsewhere, to-wit:—
Laughlin *v.* Solomon 180 Pa. St. 179.
Tunstall *v.* Pollard's Adm'r 11 Leigh. 1,
Mirey *v.* Mirey ex'or 32 Conn. 308
Brown *v.* Knapp 79 N. Y. 140
Lake *v.* Hardee 57 Ga. 467
Bank of Mobile *v.* McDonald 22 Ala. 476
Cady *v.* Bird 21 Kans. 667
Lewis *v.* Reed 11 Ind. 242
Mitchell's Lessee *v.* Eyster 7 Oh. 257

31 The cases of
Mitchell's Lessee *v.* Eyster, 7 Oh. 257
Cady *v.* Bird 21 Kans. 667
Bank of Mobile *v.* McDonald 22 Ala. 476

are not applicable here because in each instance there was a statute in the State where the case arose and was decided authorizing a suit against a foreign executor or administrator.

In the Kansas case the statute was in these words:—

"An executor or administrator duly appointed in any other State or county may sue or be sued in any court in this State in his capacity of executor or administrator, in like manner and under like restrictions as a non-resident may be sued."

In the Ohio case it was in these words:

"In case of a debtor residing out of the State the writ of attachment as above provided may issue against his heirs, executors or administrators."

In the Alabama case it was in these words:

"And in case of the death of any debtor residing out of the limits of this State, having lands or other property therein, the creditors resident within the State shall in like manner be entitled to recover by attachment against the executors and administrators."

The Ohio and Alabama statutes do not as plainly as the Kansas statute authorize a suit against a foreign executor or administrator but there is no room for question but that those statutes were intended to and did authorize suits against foreign executors and administrators. There is no such statute in this State and it is not contended that there is. Those three cases, therefore, have no application here.

In the case of
Lewis *v.* Reed, 11 Ind. 242,

32 a suit was brought against a non-resident of Indiana, who had been appointed administrator in that State, in his individual capacity. In the course of the opinion the court say:

"Another position is taken by counsel in the case, viz:—that Lewis should have been sued, if at all, as administrator, and not in his individual capacity. A foreign administrator is liable to be proceeded against by attachment; and perhaps the complaint in this case might well be regarded as against Lewis in that capacity."

It is evident from this that there was a statute in Indiana authorizing a suit against a foreign administrator by attachment so that if that case had involved a suit against a foreign administrator in his capacity as such it would have to be classed with the three cases just considered and held to be non-applicable here.

The case of

Brown *v.* Knapp, 79 N. Y. 140

was a suit in New York by a legatee against an executor of a Connecticut testator, who had qualified as such in that State, but who resided in New York, to whom a devise had been coupled with an obligation to pay the legacy and interest thereon, to recover the interest. It was held that the executor was individually liable for the legacy and the interest thereon and the fact that he was sued as executor could be ignored and the suit treated as against him individually. This case certainly has no applicability here.

The cases of

Lake *v.* Hardee, 57 Ga. 467
Tunstall *v.* Pollard adm'r 11 Leigh. 1
Laughlin *v.* Solomon, 180 Pa. St. 179

were all cases of suits against foreign executors who had removed to the States where the suits were instituted and brought with
33 them assets collected in the jurisdiction where appointed or were liable for assets so collected. In the Georgia case the executor was also trustee under the will and was sued as trustee, though he was treated as if sued as executor. There are other decisions to the contrary of this. As, for instance:

Peterson *v.* Chemical Bank, 32 N. Y. 21
Hedenberg *v.* Hedenberg, 46 Conn. 30

As to the wieght of authority on this proposition it is stated in Minor Conflict of Laws, 236

that;

"If an administrator, appointed in one State, removes with the assets of the estate into another State, the courts are divided upon the question whether or not the dededent's creditors may sue the administrator in the latter State without a reappointment, the wieght of authority seeming to favor the right of the creditors to sue. But if the administrator should only come into the State transiently or temporarily, the better opinion would seem to be that no action will lie against him there without a new appointment."

The ground upon which the right to sue the foreign executor in such a state of the case is based is necessity. As the foreign executor has removed to the State where suit is brought having wasted the assets collected in the foreign jurisdiction or brought them with him, if he cannot be sued there he cannot be sued at all. In the Virginia case Judge Tucker said:

"Upon a full view of the whole subject I am of the opinion that justice, convenience and necessity require a recognition of the right

to sue an executor who has qualified abroad if he comes within the jurisdiction bringing the assets with him."

The Kentucky case of

Keiningham *v.* Keiningham, 71 S. W. 497

and the other Kentucky cases cited in the opinion in that case are all cases of the same sort; and Mr. Minor cites the cases of

34 Atcheson *v.* Lindsey 6 B. M. 86

Embry *v.* Miller 1 Mar.

along with others, as justifying his statement that the weight of authority is in favor of the right to sue in such a case.

If necessity is the ground of suit in such a case the pendulum of authority might well swing to the other side if the executor sued is only transiently or temporarily within the State, as Mr. Minor states it has done: And, if such is the ground of the right to sue in such a case, authorities holding that a right to sue exists in such a case are not authorities in support of the contention here that a foreign executor or administrator may be sued in relation to assets located within the State where the suit is brought. For, in relation to such assets, no such suit is essential in order to reach them.

The only other authority cited by counsel for plaintiff from other jurisdiction than Kentucky not yet considered is the case of

Marcy *v.* Marcy's Ex'or 32 Conn. 308

That case was a suit in Connecticut against a Massachusetts executor who had collected assets in Connecticut and had removed to or lived in that State. The case of

Campbell *v.* Toursy, 7 Con.

was a suit in New York against a Pennsylvania executorr who had collected assets in New York and removed there.

The two cases were alike in their essential characteristics. It was held in both cases that the foreign executor could be sued. They differed in this, however, that in the New York case it was held that he should be sued as executor *de son tort* whereas, in the Connecticut case it was held that he might be sued as executor *de jure*. In the Connecticut case Judge Butler said;

35 "Most of the cases in which it has been held that a foreign executor could not be sued, were cases where there were no assets in the jurisdiction where the suit was brought and there was an attempt to charge him in respect to assets situate in the State or county of the domicil. Here there were assets in the State which the defendant had collected and which the plaintiff, as creditor, was entitled to have appropriated to payment of his debts, and why should he not be suable here, if at all, for that reason and holden to that extent as executor *de jure?* He was such and could not and did not deny it and not by grant of administration but by force of the will. He was suable before probate as executor *de jure* in Massachusetts as every executor is who does not renounce and his condition was substantially the same here. He is sued as executor gen-

erally in either case and why resort to legal friction and estoppel when it is entirely unneccessary? Grant that it is necessary in respect to a foreign administrator it is not so in respect to an executor." In the case of

Hopper *v.* Hopper, 125 N. Y. 400

Judge Finch, in speaking of the law as laid down in the case of Campbell *v.* Tonsey, said:—

"Before the Code and before the Revised Statutes the foreign executor who came into our jurisdiction and intermeddled with assets here could be sued as executor *de son sort*. The law regarded him not as a foreign executor but an executor here having made himself such by his own wrongful conduct."

But, as to which position is correct whether he should be sued as executor *de son tort* or executor *de jure* the ground of suability at all is the fact that he has collected the assets. If he has not collected the assets these decisions are not authorities that he is suable at all.

36 This disposes of all the cases cited by counsel for plaintiff except the Kentucky case of

Davis *v.* Connelly's Ex'or 4 B. M. 136

In that case it was simply held that a judgment rendered in Ohio against Kentucky executors in a suit in which they had voluntarily appeared and made defense was binding upon said executors and that they might be sued upon in Kentucky. There is nothing in the point there decided that has any bearing upon the question involved here.

This consideration of the authorities cited shows that none of them are applicable here or contravene the position taken in the former opinion, and, I do not think that any authorities can be found that do. The general rule as to the suability of foreign executors or administrators is thus stated in

13 A. & E. Enc. of Law 2nd edit. p. 957:

"An executor or administrator cannot be sued in his representative character unless he is made liable by statute either at law or in equity in the courts of any State or county other than that in which he has received his appointment."

It is thus stated in Minor on Conflict of Laws p. 235:

"It is the general doctrine both in England and America that no suit can be brought by or against an executor or administrator in his official capacity in the courts of any country save that from which he has derived his authority to act by virtue of the letters of probate or of administration there granted him."

Instances of statutes making him liable in the courts of another State than that in which he received his appointment are found in the cases cited by plaintiff's counsel, considered above. Those cases show also an exception to the general rule quite generally held in the case of a foreign representative who has collected assets

37 in the jurisdiction where appointed and wasted them or brought them with him to the jurisdiction—where suit is

brought and there settled—an exception recognized as a matter of "justice, convenience and necessity."

They show also an exception in the case of a foreign representative coming into the jurisdiction where suit is brought and without administering there collecting assets subject to that jurisdiction and thereby rendering himself liable to the courts of that jurisdiction. That apart from the consideration of his having collected assets there he is not liable to suit in relation to such assets nor can such assets be reached through a suit brought against him is clear. Dr. Minor, in his work on Conflict of Laws, p. 236, says;

"If a creditor of a decedent wished to sue in a foreign State to reach assets situate there, he must have letters of administration taken out there, before the suit can be instituted. He cannot in general sue a domestic administrator in a foreign court of a foreign administrator in a domestic court."

Story's Conflict of Laws (8th edit.) p. 715, thus states the law as to this.

"If a creditor wishes suit to be brought in any foreign country in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country is not suable there and has no positive right or authority over those assets, neither is he responsible therefor."

It is certain and conceded by counsel for plaintiff that a foreign representative of a decedent could not bring suit to recover such assets because of his foreign credentials. It would be strange, such being the case, that he could be sued in relation to such
38 assets or such assets be reached in a suit against him, simply because of the existence of such foreign credentials without more.

The ground upon which a foreign representative cannot sue or be sued in another jurisdiction is thus stated by Judge Finch in the case of

Hopper *v.* Hopper, *supra.*

"By the phrase 'foreign executor' the courts mean the foreign origin of the representative character. That is the sole product of the foreign law and depending upon it for existence cannot pass beyond the jurisdiction of its origin. The individual may come here and acquire rights or incur liabilities since we recognize in him no representative character. The foreign executor may make a contract here which our courts will compel him to perform because it is his contract, but, where it is the testator's only he cannot sue or be sued upon it, since the right, or the liability is purely representative and exists only by force of his official character and so cannot pass beyond the jurisdiction which gave it."

This being so, there is no room for holding that this suit is maintainable against the defendant executor. There is no statute in this

State rendering a foreign executor or administrator suable therein. Sections 3878 and 3879 Ky. Stat. provide for his suing herein upon taking certain steps. If he takes such steps he cannot only sue therein but is liable to be sued therein even by a non-resident creditor as was held in New York in the case of

Hopper *v.* Hopper, *supra.*

Sections 3898, 3899 and 3900 Ky. Stat. provide for administration upon the assets of a non-resident decedent located in this State. By either procedure creditors of a non-resident decedent subject
39 assets located in this State to the payment of their debts. This procedure is ample to secure them in their debts But whether so or not there is none other. The legislature of Kentucky has not seen fit to provide that suits may be brought against foreign executors or administrators and attachments obtained against the estates of their decedents located in this State as has been done in the States of Kansas, Ohio, Alabama, Indiana and perhaps in other States. In the absence of such a statute no such suit can be brought in this State. And I think the case of

Smith *v.* Baker, 3 Met. 264

cited in former opinion is directly in point here. The facts of the case are merely stated in the opinion. But it cites the extract from Story quoted above in support of the decision there made and the reasonable inference is that it was a suit against a foreign representative to subject assets in this State or to render him liable on account of assets therein. And whether so or not it expressly lays down the only condition upon which a foreign representative can be sued in this State and this case does not come within that requirement.

Judge Duvall said:

"An administrator or executor who is appointed, who qualifies in another State, and there receives assets into his hands may be sued in the tribunals in this State by the person or persons entitled to such assets *if he shall have removed to and settled in this State.* Such seems to be the well settled doctrine. But the right to sue a foreign administrator has never been extended further."

If then, it be conceded that the liability of the non-resident corporation doing business in this State to the decedent Atwater is an asset located in this State and that it is allowable for a creditor of decedent to sue out an attachment against his property in a
40 suit against his personal representative, the latter of which two conditions at least, I very seriously doubt, still, this suit cannot be maintained because it is a suit against a foreign executor who has never collected said asset and has never complied with sections 3878 and 3879 Kentucky Statutes so as to be authorized to sue for it and there is no statute in this State authorizing such a suit. I must, therefore, adhere to my former opinion.

A. M. J. COCHRAN, *Judge.*

And on a day following, to-wit: on April 21" A. D. 1903 final decree was entered and filed herein which was and is in words and figures following, to wit:—

Order Book "J," page 67.

This cause having been heard and submitted on the plaintiff's motion to remand this case to the State court, and on the defendant's demurrer to the jurisdiction of this court, and the motion of defendants to dismiss this case for want of jurisdiction in this court, and the court being fully advised, it is ordered that plaintiff's motion to remand this case to the State court be and it is hereby over-ruled to which plaintiff excepts.

It is further ordered, adjudged and decreed that defendant's demurrer to the jurisdiction of this court and motion to dismiss this suit for want of jurisdiction in this court, be and the same are hereby sustained, and that this suit be and the same is hereby dismissed for want of jurisdiction in this court. And thereupon came plaintiff in open court and filed his petition for an appeal and assignment
41 of errors, and prayed an appeal to the Supreme Court of the United States from this final decree in dismissing said suit for want of jurisdiction in this court, which appeal is hereby allowed upon the execution of a bond in penalty of $500.00 by plaintiff, M. H. Courtney, with good and sufficient security that appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, which bond shall operate as a supersedeas.

And on the same day, to-wit: on April 21" A. D. 1903, petition for appeal and assignment of errors was filed herein—which was and is in words and figures following, to-wit:—

United States Circuit Court, Sixth Circuit and Eastern District of Kentucky.

M. H. COURTNEY, Plaintiff,
v.
LOUIS A. PRADT, EX'R, ET AL., Defendants. } Petition for Appeal and Assignment of Errors of M. H. Courtney.

The above named plaintiff, M. H. Courtney, conceiving himself ag-rieved by the final decree, order and judgment, this day entered in the above entitled cause, dismissing this suit for want of jurisdiction, hereby appeals therefrom and prays that this, his appeal to the Supreme Court of the United States may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree, order and judgment was made, duly authenticated, may be sent to said Supreme Court of the United States, and plaintiff states that the said final decree, order and judgment contains
42 manifest errors to his prejudice committed, and assigns the following errors, to-wit:—

I.

The court erred in over-ruling and in not sustaining plaintiff's motion to remand this cause to the State court.

II.

The court erred in sustaining and in not over-ruling defendant's demurrer to the jurisdiction of this court.

III.

The court erred in sustaining and in not over-ruling the defendant's motion to dismiss this suit for want of jurisdiction in this court.

IV.

The court erred in dismissing this suit for want of jurisdiction in this court.

Wherefore, this petitioner says that the said final decree, order and judgment aforesaid, is erroneous, and prays this honorable court to grant him an appeal to the Supreme Court of the United States to the end, that said decree may be reversed, and that said errors may be corrected, and so he will ever pray.

W. B. DIXON,
Solicitor for Plaintiff, M. H. Courtney.

And on the same day, to-wit: on April 21" A. D. 1903 an entry was made herein which was and is in words and figures following, to-wit:—

Order Book "J," page 68.

43 This day came the complainant herein, by his counsel, and by leave of court had and obtained files his petition for appeal and assignment of errors herein and prays that this, his appeal to the Supreme Court of the United States be allowed.

The court, being fully advised herein, it is now ordered that the appeal prayed for by the complainant herein be allowed and the appeal bond is fixed at $500.00

And now comes the complainant and offers bond in the sum of $500.00 with A. M. Spottswood as surety herein, which bond is approved.

44 And on the same day, to-wit: on April 21", A. D. 1903 bond, mentioned in the foregoing entry, was filed herein which was and is in words and figures following, to-wit:—

Bond.

Know all men by these presents, that we, M. H. Courtney, as principal and A. M. Spotswood are firmly held and firmly bound unto Louis A. Pradt, executor of M. B. Atwater, deceased, and Wm. B. Atwater in the full and just sum of five hundred dollars ($500.00) to be paid to the said Louis A. Pradt, executor of M. B. Atwater, deceased, and Wm. C. Atwater, certain attorneys executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Seales with our seals and dated this 21" day of April in the year of our Lord one thousand nine hundred and three.

Whereas, lately at Covington, Kentucky, in circuit court of the United States, eastern district of Kentucky, in a suit depending in said court, between M. H. Courtney *vs.* Louis A. Pradt, executor of M. B. Atwater, deceased, and Wm. C. Atwater a decree was rendered against the said M. H. Courtney and the said M. H. Courtney having obtained appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said Louis A. Pradt, executor of M. B. Atwater, deceased and Wm. C. Atwater citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, in said circuit on the — day of —— next.

45 Now, the condition of the above o*lb*igation is such, that if the said M. H. Courtney shall prosecute appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above o*lb*igation to be void; else to remain in full force and virtue.

M. H. COURTNEY. [SEAL.]
A. M. SPOTSWOOD. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—

A. M. J. COCHRAN,
U. S. District Judge.

And on a day following, to-wit: on June, 12th. A. D. 1903 citation was issued herein which was and is in words and figures following, to-wit:—

Citation.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit,* } *ss:*

United States Circuit Court of Appeals for the Sixth Circuit.

To Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater, Greeting:

You are hereby cited and admonished to be and appear at
46 a session of the Supreme Court of the United States to be holden at the city of Washington, on the twel-th day of July next, pursuant to an appeal, filed in the clerk's office of the circuit court of the United States for the eastern district of Kentucky, wherein M. H. Courtney, — appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this twel-th day of June, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States of America the one hundred and twenty-seventh year.

A. M. J. COCHRAN,
United States District Judge.

And on a day following to-wit: on June 15th. A. D. 1903, the citation heretofore issued herein, was returned and filed same being endorsed in words and figures following to-wit:

I accept service of the within citation for *for* appellees. This June 13th. 1903.

R. D. HILL,
Att'y for Appellees.

47 UNITED STATES OF AMERICA, *Eastern District of Kentucky,* } *ss:*

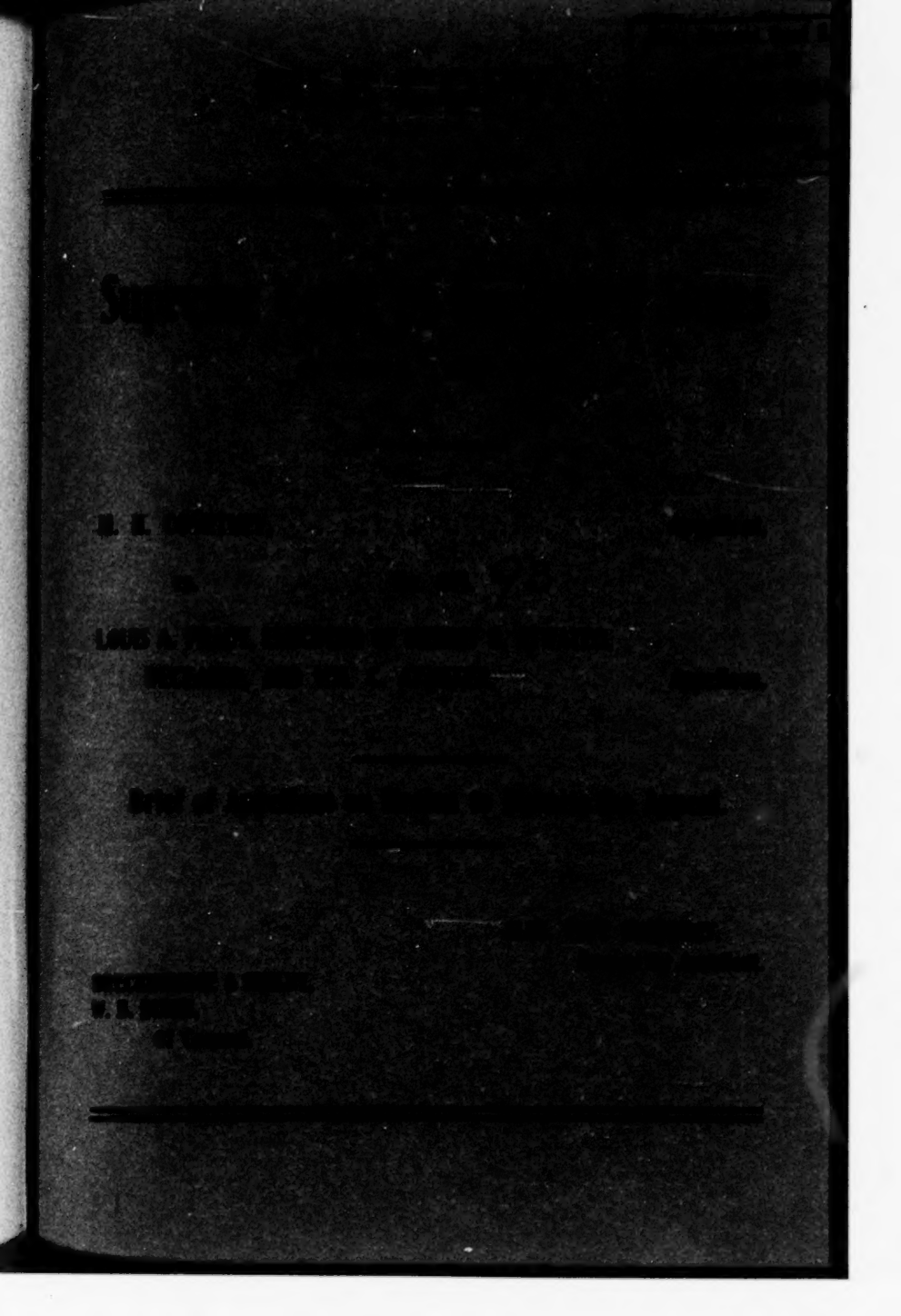
I, Jos. C. Finnell, clerk of the United States circuit court, for the sixth judicial circuit and eastern district of Kentucky, at Covington, do hereby certify that the foregoing 46 pages contain a full, true and complete transcript of the file and proceedings had herein in the matter set out in the caption hereto, as the same appears from the records and files of this office.

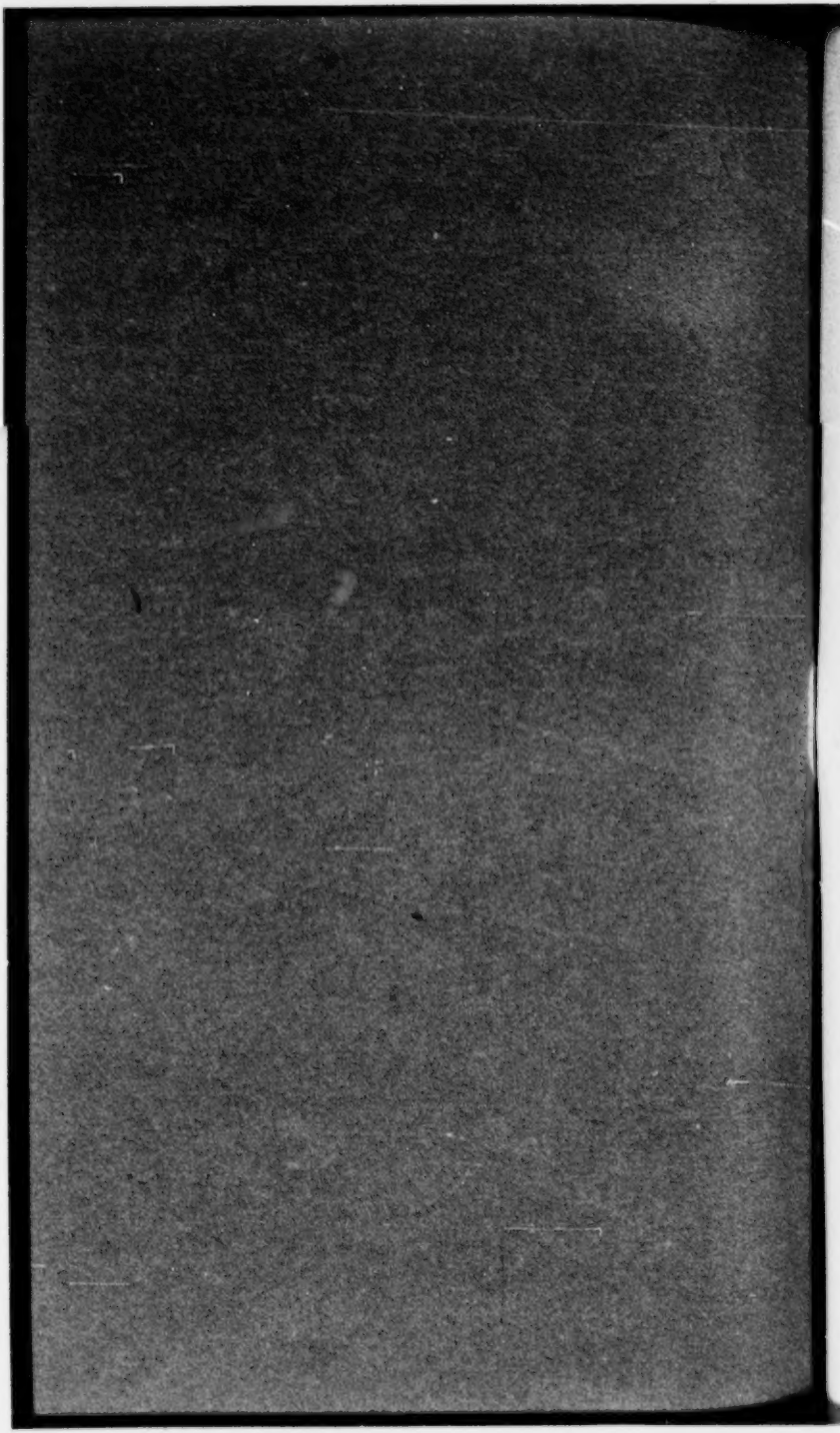
Witness, my hand as clerk, and the seal of said court, at Covington, this 15 day of June A. D. 1903. and of our Independence the 127 year.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

JOS. C. FINNELL, *Clerk,*
By J. W. MENZIES, *D. C.*

Endorsed on cover: File No. 19,022. E. Kentucky C. C. U. S. Term No. 371. M. H. Courtney, appellant, *vs.* Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater. Filed July 27th, 1903.





Supreme Court of the United States,

OCTOBER TERM, 1903.

M. H. COURTNEY, - - - - - - Appellant,

vs. No. 371.

LOUIS A. PRADT, EXECUTOR OF MERRIT B. ATWATER, DECEASED, AND WM. C. ATWATER, - - - - - - - Appellees.

BRIEF OF APPELLANT ON MOTION TO DISMISS THE APPEAL.

The appeal herein is from a decree of the United States Circuit Court for the Eastern District of Kentucky, dismissing for want of jurisdiction a suit which had been removed to that court from the Powell County Circuit Court wherein a petition in equity had been filed against non-resident defendants, and jurisdiction obtained over the *res* by warning order and foreign attachment. There was no personal service of summons upon the defendants, and they have entered their appearance only for the purpose of objecting to the jurisdiction of the court. They, being the appellees here, have moved to dismiss the appeal upon five grounds, all of which will be considered in this brief in the order in which they are stated in the motion.

I.

Their first ground is, "First. Because the appeal herein does not involve the jurisdiction of the said circuit court as a federal tribunal as contemplated by the judiciary act of March 3, 1891, section 5."

As to this ground, appellant contends that the appeal does involve that question of jurisdiction, in that the circuit court had no jurisdiction to proceed in the

case and should have remanded it to the State court: First, because the defendants were before the court by constructive service only, and second, because the nature of this controversy is such that the suit was not properly cognizable in the United States Circuit Court as a federal tribunal.

THE DEFENDANTS WERE BEFORE THE COURT BY CONSTRUCTIVE SERVICE ONLY.

Could the United States Circuit Court proceed in the cause, unless there was actual service of process on the defendants, or an entry of their appearance? We think this question has been repeatedly answered by this court, that it could not.

In Pollard v. Dwight, 4 Cranch, 421, Dwight and others brought a foreign attachment against Pollard and Pickett, returnable to the county court of Hartford, Conn. The defendants removed the action to the circuit court of the United States for the district of Connecticut. This court said, page 429:

> "By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which they would have stood, had process been served upon them, and, consequently, waived all objections to the non-service of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the State court in which it was instituted, and this court would be bound now to direct that proceeding."

In Toland v. Sprague, 12 Peters, 328, in considering a case of foreign attachment, authorized by the statutes of Pennsylvania, this court said:

> "Although the process acts of 1789 and 1792 have adopted the forms of writs and modes of

process in the several States, they can have no effect where they contravene the legislation of Congress. The state laws can confer no authority on this court, in the exercise of its jurisdiction, by the use of state process, to reach either persons or property; which it could not reach within the meaning of the law creating it."

On page 330, it said:

"With these views, we have arrived at the same conclusions as the circuit court of Massachusetts, as announced in the following propositions, namely: 1. That by the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. 2. That independently of positive legislation, the process can only be served upon persons within the same districts. 3. That the acts of Congress adopting the state process, adopt the form and modes of service, only so far as the persons are rightfully within the reach of such process, and did not intend to enlarge the sphere of the jurisdiction of the circuit courts. 4. That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court, *in personam;* that is, where they are inhabitants, or found within the United States; and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add, that even in case of a person being amenable to process *in personam,* an attachment against his property can not be issued against him, except as part of, or together with process to be served upon his person."

In Chaffee v. Hayward, 20 Howard, page 215, the court said:

"It has been several times held by this court as the true construction of the foregoing section,

> that jurisdiction of the person of a defendant (who is an inhabitant of another State) can only be obtained, in a civil action, by service of process on his person, within the district where the suit is instituted; and that no jurisdiction can be acquired by attaching property of a non-resident defendant, pursuant to a State attachment law. The doctrine announced to this effect, in the case of Toland v. Sprague, in 1838, (12 Peters, 327) has been uniformly followed since, both by this court and at the circuits. (15 Pet., 171; 17 How., 424.)"

In ex parte Railway Company, 103 U. S., 794, the circuit court of the United States for the district of Iowa had dismissed a suit and dissolved an attachment, issued and levied in accordance with the laws of Iowa, on property of a non-resident defendant, who was not found within the district and who was a citizen of Massachusetts. Application was made to this court for a mandamus to compel the circuit court to re-docket the case and grant an order of service by publication and to proceed to hear the cause. The mandamus was denied by this court. On page 796, it said:

> "It is conceded that the person against whom this suit was brought in the Circuit Court was an inhabitant of the State of Massachusetts, and was not found in or served with process in Iowa. Clearly, then, he was not suable in the Circuit Court of the district of Iowa, and unless he could be sued no attachment could issue from that court against his property. An attachment is but an incident to a suit, and unless the suit can be maintained the attachment must fall."

In Harland v. United Lines Telegraph Co., 40 Fed. R., 308, the court held that the act of March 3, 1887, "introduced no new principle which obviated the necessity of personal service" in attachment cases.

It said:

"It will be readily admitted that the United State courts, which are created by statute 'can have no jurisdiction but such as the statute confers' (Sheldon v. Sill, 49 U. S., 8 How., 441, 12 L. ed. 1147), and that this doctrine has been asserted with great earnestness by the supreme court. It is furthermore evident that a State may subject property situated within its limits, which is owned by non-residents, to the payment of the demands of its own citizens, and that, when the non-resident can not be personally served with process, the statutes of the State may authorize a constructive service, which shall be sufficient to subject the property to a proceeding *in rem;* but such proceedings must be authorized and derive their validity from the local statutes. Pennoyer v. Neff, 95 U. S., 714 (24 L. ed. 565.)

"Neither can it be denied that prior to the enactment of sections 914 and 915 there was no statute of the United States which gave authority to a circuit court, by original process, in an action at law, to seize the property of a non-resident defendant, and subject it to the demands of a resident plaintiff, without personal service upon the defendant, and, in the case of a corporation, upon such agents as may properly be deemed its representatives, or the voluntary appearance of the defendant in the suit.

"In the well known case of Toland v. Sprague, 37 U. S., 12 Pet., 300 (9 L. ed. 1093), the following proposition was announced, which has since been adhered to (Curt. Jur. of U. S. Courts, 105); and in Ex parte Des Moines & M. R. Co., 103 U. S. 794 (26 L. ed. 461), was evidently regarded as axiomatic: "(4) That the right to attach property, to compel the appearance of persons can properly be used only in cases in which such persons are amenable to the process of the court *in personam;* that is, where they are inhabitants, or found within the United States, and not where they are aliens, or citizens resi-

dent abroad, at the commencement of the suit, and have no inhabitancy here; and we add that, even in case of a person being amenable to process *in personam*, an attachment against his property can not be issued against him, except as part of, or together with process to be served upon his person.'

"In ex parte Des Moines & M. R. Co. decided in 1880, Chief Justice Waite said: 'It is conceded that the person against whom this suit was brought in the circuit court was an inhabitant of the State of Massachusetts, and was not found in, or served with process in, Iowa. Clearly, then, he was not suable in the Circuit Court of the district of Iowa, and unless he could be sued, no attachment could issue from that court against his property. An attachment is but an incident to a suit, and, unless the suit can be maintained, the attachment must fall.'

"The attachment in that case was made in accordance with the statute of the State of Iowa in regard to attachments of the property of non-residents. But it is said, notwithstanding this decision was made after sections 914 and 915 were passed, that those sections confer upon the circuit courts jurisdiction *in rem* over attached property of non-residents which is situated within the limits of the State wherein the suit is brought, if the attachment is made in conformity with State laws. Section 914 assimilates the practice, forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the courts of the United States, to the practice, forms and proceedings in the courts of record of the State within which such circuit or district courts are held. The statute is an act in regard to practice and procedure, and not in regard to jurisdiction. The question at issue in this case relates to the power of the court. Section 914 con-

fers no new power or authority upon the circuit court.

"In Butler v. Young, 1 Flip. 276, the distinction which is to be observed, in the construction of this section, between power which is conferred and practice which is to be observed, is clearly pointed out. The court says: 'Care and caution will be used that substantive rights given by the State laws shall not be confounded with what is mere practice in the State courts. In this connection, I may mention, among other matters, the right to bring an absent or non-resident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the State, and in my opinion, were not contemplated by Congress, by the law in question, to be given to parties in this court.' Wear v. Mayer, 6 Fed. Rep., 660; Lyons v. Lyons Nat. Bank, 19 Blatchf., 279, 8 Fed. Rep., 369; New York L. Ins. Co. v. Bangs, 103 U. S., 435 (26 L. ed., 580.)

"Section 915 entitles plaintiff, in common law causes in the courts of the United States, to similar remedies by attachment against the property of the defendant which are provided by the law of the State in which such court is held for its courts. It empowers the United States Court to adopt the remedies by attachment or other process, and relates to methods and forms. It does not create jurisdiction over property without personal service upon the defendant.

As succinctly stated by Mr. Justice Miller, in Nazro v. Cragin, 3 Dill., 474: 'The effect of this section in the Act of 1872 is simply this: If the court has or can acquire jurisdiction over the defendant personally, this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction.' Chittenden v. Darden, 2 Woods, 437."

It is evident, we think, in the light of the above authorities, that section 4 of the judiciary act of March 3, 1875, providing that upon the removal of a suit from the state to a federal court, any attachment had in the state court shall hold the property attached to answer the final judgment or decree in the same manner as by law it would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced, was not intended to enlarge the jurisdiction of the federal courts so as to permit a judgment or decree to be rendered in the removed case upon constructive service only.

THE NATURE OF THIS CONTROVERSY IS SUCH THAT IT WAS NOT PROPERLY COGNIZABLE IN THE UNITED STATES CIRCUIT COURT AS SUCH.

But if this court should be of the opinion that the filing of the special demurrer (Printed Record, pages 13 and 14), by the defendant, L. A. Pradt, Executor, was equivalent to him entering his appearance in the cause, and that this gave the circuit court power to proceed as against him—then, we say, that the nature of the suit against him is such that the circuit court could not proceed; that the case comes clearly within the principles decided in Cates v. Allen, 149, U. S., 452 and authorities there cited.

The nature of this suit against the defendant, executor, is such that common law courts would have had exclusive jurisdiction of it, but for the fact that he is a non-resident of the State of Kentucky. It is a suit upon a written contract, to recover of him, eight thousand dollars, with interest, from a certain day. The defendants however, being non-residents, the plaintiff, was compelled by the State Statutes to sue in equity—the courts of equity alone being given jurisdiction of attachment proceedings against non-residents. The circuit court, however, took issue with us on this proposition. It said in its opinion, Record 18:

> "If such a suit as that brought herein is maintainable it is a suit at law. The mere fact that an attachment is sued out in it does not make it a suit in equity. The early attachment statutes of Kentucky may have provided that the suit should be in equity. But the present attachment statutes do not so provide, and they more frequently find application in actions at law than in suits in equity."

An examination of the present statutes, together with the earlier ones, will, we think, show clearly that the circuit court was in error on this point.

Prior to the adoption of a code of practice in Kentucky, the statute law providing upon what grounds attachments might issue and in what courts attachment suits might be brought, is found in the following two acts of the Legislature of Kentucky. The act of 1839, Session Acts, page 259, entitled "An act to reduce into one the several attachment laws, and for settling proceedings on attachments against absconding debtors," approved February 20, 1839, related to attachments at law, and provided the following grounds upon which an attachment at law might issue:

"Section. 1. That it shall and may be lawful for any creditor (or in his absence, his agent), to go before any justice of the peace of the county in which his debtor resides or last resided, and make complaint that his debtor is removing out of the county privately, so that the ordinary process of the law can not be served upon him, or absconds and conceals himself so that the ordinary process of law can not be served upon him; upon which complaint, such justice shall issue an attachment against the estate of such debtor, or so much thereof as shall be of sufficient value to satisfy the debt, interest and cost of such creditors, returnable before himself or some other justice of the peace, when the debt shall be fifty dollars or under, and returnable to the circuit court of his county, when the debt shall exceed fifty dollars." . . . . . .

"Sec. 6. When the sheriff, or other proper officer, shall return, on any writ of *capias,* or upon a warrant, to answer in any civil action, that the defendant 'is not found within his county,' the plaintiff may sue out an *alias* or *plurics capias,* or another warrant, until, the same shall be served; or such plaintiff may, at his election, sue out an attachment against the estate of the defendant to force an appearance; and if the sheriff, or other officer, shall return that he hath attached any goods, and the defendant shall not appear and replevy the same, the plaintiff shall be entitled to a judgment for his debt or damages, and costs; which judgment shall be final in all actions of debt founded on any specialty, bill or note in writing, ascertaining the demand, unless the plaintiff shall choose, in any such case to have a writ of inquiry of damages; and in other cases the damages shall be settled by a jury, sworn to inquire thereof." . . . . . .

These were the only grounds upon which an attachment at law could issue prior to the adoption of the code. It is clear that this act did not authorize an attachment at law to issue upon the ground that the defendant was a non-resident, and that it did not give to the common-law courts of Kentucky jurisdiction of attachments against a non-resident. The chancery courts, however, were given jurisdiction by the act of 1837, Session Acts, page 103. This act related to two classes of defendants: 1. Those who were "non-residents of this State;" and 2, those who were "absent from the same." It provided:

"Sec. 1. That when any person or persons, co-partnership or corporation, have any claim or demand, in law or equity, due and owing from any other person or persons, co-partnership or corporation, who, or some of whom, are non-residents of this State, or absent from the same, or the officer or officers of the corporation, who ought to be served with process, are non-residents of this State, or absent from the same, and there shall be within this State any person or persons, co-partnership or corporation, indebted to such person or persons, co-partnership or corporation, who are, or some of whom

are, non-residents of this State, or absent from the same, as aforesaid, or shall have in possession, or under control, any land or effects, belonging to such person or persons, company or corporation, or when such lands and effects shall be within this State, then, in all such cases, it shall and may be lawful for the person or persons, co-partnership or corporation, having the claim or demand, to file a bill in chancery, and attach such lands and effects, and the debts due by the person or persons, co-partnership or corporation, within this State, to the person or persons, co-partnership or corporation, who, or some of whom, as aforesaid, are non-residents, or absent from the State: *Provided,* That no such attachment shall be available against any absent defendant, without an allegation, supported by oath, that the absent defendant has left the State to avoid suit by the ordinary process of law, or has been without the State for such length of time, that one term of the circuit court, where such absent defendant usually resides, has intervened during his absence, and the service of the ordinary process of law has been impracticable."

It will be observed that this act gives jurisdiction of attachments to the courts of chancery of any claim or demand *in law or in equity* against non-resident or absent defendants, whenever there is a person within the State indebted to such defendant, or when such defendant has property, real or personal, within the State.

In Watts v. Griffin, Litt. Select Cases, 244, the court of appeals of Kentucky, in 1821, passed on the validity of a similar statute to this, and held that it was constitutional, notwithstanding it dispensed with a jury trial as to common-law demands.

The court said, page 245:

> "The power of the court over such a case may be readily perceived by adverting to the provisions of the statute of this country regulating attachments in chancery and proceedings against absent defendants. That statute was admitted in argument to confer upon the Court of Chan-

cery jurisdiction, in cases which would otherwise be properly cognizable at law."

After referring to the various Virginia Statutes, from which the Kentucky Statute was taken, the court, on page 247, said:

> "The propriety of the court deciding without calling a jury, might have been more doubtful, if at the adoption of our Constitution, the matter had been exclusively cognizable at law, and the Court of Chancery had taken jurisdiction under a statute subsequently enacted. A decision of the facts by the court, might then be considered an innovation on the ancient right of trial by jury, and in conflict with that provision of the Constitution which declares that the ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate. But the statutes to which we have referred, were all enacted long before the adoption of the Constitution, and any power which the court derived from those statutes before the adoption of the Constitution, may, no doubt, now be exercised without violating any constitutional provision. The statute of this country, it is true, was enacted after the adoption of our first Constitution, but that statute confers no power on the court which it did not possess under the statutes of Virginia; and, according to those statutes, we apprehend, the court might decide the cause without a jury. Those statutes contain no express provision as to the mode of deciding the cause, but they contain a grant of jurisdiction, and that implies a grant of all power necessary to a final decision of the matter in contest."

It is clear from the two acts above quoted—the one conferring jurisdiction on courts of law to issue attachments against absconding debtors, the other conferring jurisdiction on courts of chancery to issue attachments

against non-residents and absent defendants—that the latter jurisdiction was, at that time, *exclusively* within the courts of chancery. Both of these acts remained in force until the adoption of the Code of Practice. The first Code of Practice was adopted by an act entitled, "An Act to establish a Code of Practice in civil cases in the courts of this Commonwealth," approved March 22, 1851. It took effect August 1, 1851.

Section 242 of that Code related to "Grounds of Attachment." It did not relate to the jurisdiction of the courts. It provided:

> "Sec. 242. The plaintiff in a civil action, may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered:
>
> First. In an action for the recovery of money where the action is against
>
> 1. A defendant, or several defendants, who, or some one of whom, is a foreign corporation, or a non-resident of this State; or
>
> 2. Who has been absent therefrom four months."

There are six other grounds set out in this section. Section 3 of that Code provides:

> "Sec. 3. The proceedings in a civil action may be of two kinds:
>
> "1. Ordinary.
>
> "2. Equitable."

Sections 4 and 5 relate to the jurisdiction of the courts. They provide:

> "Sec. 4. The plaintiff may prosecute his action by equitable proceedings in all cases where courts of chancery, before the adoption of this Code, had jurisdiction, and must so proceed, in

all cases where such jurisdiction was exclusive."

"Sec. 5. In all other cases, the plaintiff must prosecute his action by ordinary proceedings."

It is thus seen, by section 4, that all actions which were *exclusively* cognizable in chancery before the adoption of that Code, *remained so,* after its adoption.

The present Code contains substantially the same provisions, in regard to the grounds of attachment and jurisdiction of the courts, as those contained in the Code of 1851. Section 194 provides:

"Sec. 194. The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as is provided in section 227, as a security for the satisfaction of such judgment as may be recovered:

1. In an action for the recovery of money against—

1. A defendant, who is a foreign corporation, or a non-resident of the State; or

2. Who has been absent therefrom four months."

It also contains eight additional grounds for attachment.

When the Circuit Court said, in its opinion, that the present attachment statutes "more frequently find application in actions at law than in suits in equity," it doubtless had in mind attachments issued on these eight additional grounds.

This section does not relate to the jurisdiction at all.

Section 6 of the present Code, relating to the jurisdiction of the courts, is:

"Sec. 6. Unless otherwise provided by this Code or other statute—

1. Actions of which courts of chancery had jurisdiction before the first day of August, 1851, may be equitable; and actions of which such jurisdiction was exclusive must be equitable."

There is no statute, other than the Code, bearing upon this question of jurisdiction, and the only other sections of the Code bearing upon it are the following:

> "Sec. 8. An error of the plaintiff as to the form of action shall be cause, not for the abatement or dismissal of it, but merely for a change into the proper proceedings by an amendment of the pleading, and a transfer of the action to the proper docket."
>
> "Sec. 10, sub. sec. 3. The court may, without motion, order the transfer of an action from one docket to another if either party be entitled to such transfer; or may try the action, or render judgment therein by default, unless a party entitled to a transfer move therefor."

It is thus seen that the present Code provides that all actions of which the courts of chancery had exclusive jurisdiction prior to the 1st day of August, 1851, the date the first Code took effect, *must be equitable,* although it allows the court to try an action erroneously brought at law when it should have been brought in equity, and *vice versa,* where no motion to transfer is made.

It follows that the suit at bar was properly brought in the State court as a suit in equity, and that it could not have been *properly* brought there as a suit at law.

There is one other section of the Code that may have a bearing. It is section 12. It provides:

> "In an equitable action, properly commenced as such, either party may, by motion, have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer."

It is at least doubtful whether this section applies to the case at bar at all, but if it does, it is only after

the defendants have entered their appearance and moved to transfer this case to the ordinary docket, and even then the Court of Equity would have to try the issues made by the attachment. That the attachment issues could not be transferred to the ordinary docket, to be tried by a jury, is decided by Meek v. McCall, 80 Ky., 371. That case was brought on the equity side of the docket, and there was a plea of payment and set-off. The court, on page 375, said:

> "The attachment did not invest the court with the right to determine a cause of action purely legal against the objection of the defendant, and on the plea of payment or set-off the appellant in this case had the undoubted right to have a jury pass upon the issue of fact."

In speaking of section 12 of the Code, the court said:

> "This section, of course can not apply when the exercise of equity jurisdiction is made to depend on the result of the legal issues; and this action is in fact, so far as the account and notes are concerned, an action ordinary with an attachment—the legal issues to be tried by a jury and the issues made by the attachment by the court."

Now the question presents itself, Could the United States Circuit Court properly take cognizance of such a suit as this?

In Cates v. Allen, 149 U. S., 456, this court, referring to the case of Scott v. Neely, 140 U. S., 106, said:

> "It was there shown that the Constitution of the United States, in creating and defining the judicial power of the general government, had established the distinction between law and equity, and that equitable relief in aid of de-

mands cognizable in the courts of the United States only on their law side could not be sought in the same action, although allowable in the State courts by virtue of State legislation; Bennett v. Butterworth, 11 How., 669; Thompson v. Railroad Companies, 6 Wall., 134; Scott v. Armstrong, 146 U. S., 499, 512; and that the Code of Mississippi, in giving to a simple contract creditor a right to seek in equity, in advance of any judgment or legal proceedings upon his contract, the removal of obstacles to the recovery of his claim caused by fraudulent conveyances of property whereby the whole suit involving the determination of the validity of the contract and the amount due thereon is treated as one in equity to be heard and disposed of without a trial by jury, could not be enforced in the courts of the United States because in conflict with the constitutional provision by which the right to a trial by jury is secured."

And, on page 459, it said:

"The fact that section 1845 aims to create a lien by the filing of the bill does not affect the question, for in order to invoke equity interposition in the United States courts the lien must exist at the time the bill is filed and form its basis, and to allow a lien resulting from the issue of process to constitute such ground would be to permit State legislation to withdraw all actions at law from the one court to the other, and unite legal and equitable claims in the same action, which can not be allowed in the practice of the courts of the United States, in which the distinction between law and equity is matter of substance and not merely of form and procedure. And as the ascertainment of the complainants' demand is by action at law, the fact that the chancery court has the power to summon a jury on occasion can not be regarded as the equivalent of the right of trial by jury secured by the

Seventh Amendment. Whitehead v. Shattuck, 138 U. S., 146; Buzard v. Houston, 119 U. S., 347."

How, then, could a United States court try the suit at bar? It could not try it as a suit in equity, because "the ascertainment of complainant's demand is (in the federal tribunals) by action at law." It could not try it as a suit at law, because the Kentucky Code gives exclusive jurisdiction to courts of equity of attachments against non-resident defendants.

II.

The second ground of the motion to dismiss the appeal is:

"Second. Because the decree of said Circuit Court, appealed from dismissing appellant's case, was not based on a denial of the jurisdiction of that court as a Federal Court, but, in the exercise of that jurisdiction: and the case was dismissed for the reason that a suit can not be maintained in the courts of Kentucky against a foreign executor."

In reply to this we say that dismissing the case for the reason that a suit can not be maintained in the courts of Kentucky against a Wisconsin executor, presents precisely the same question of jurisdiction as would have been presented in the case of Mexican Central Railway Co. v. Eckman, 187 U. S., 429, had the lower court in that case dismissed the suit for the reason that the Texas law did not permit a Texas guardian to bring a suit in his own name as guardian.

In that case, an action was brought in the Circuit Court of the United States for the Western District of Texas by J. W. Eckman, a citizen and resident of that district, as guardian of Alphonso Huesselmann, a minor, against the Mexican Central Railway Co., a corporation of Massachusetts, to recover damages for injuries sustained by him in the Republic of Mexico, through the negligence of the company in whose employment he then was. Defendant filed a plea in abatement, and asked that the action be dismissed on the ground

that Huesselmann and his parents were citizens and residents of the State of Illinois, and that defendant was a resident and citizen of Massachusetts and had not waived its right to be sued there. This plea was overruled, the case tried before a jury and a verdict and judgment rendered in favor of plaintiff. This court, after declining to consider the case on its merits, did consider the question of the jurisdiction of the Circuit Court as a court of the United States. On page 433 it said:

> "The question is whether under the laws of Texas a guardian can sue in his own name to recover damages for injuries sustained by the ward, and it is unaffected by the permanent domicile of the ward. Hoyt v. Sprague, 103 U. S., 613; New Orleans v. Gaines' Administrator, 138 U. S., 595, 606; Delaware County v. Diebold Safe Company, 133 U. S., 473, 488."
>
> . . . . . .
>
> "If, in the State of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attorneys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond."

The opinion then quotes the Texas Statutes and considers the rulings of the Texas court as to the power of the guardian to sue in his own name, and concludes:

> "We are unable to hold that the Circuit Court erred in assuming that this guardian had the legal right to bring the action in his own

name, and it is on his citizenship and not on the citizenship of the ward that the jurisdiction of the Circuit Court depended."

Now, suppose that the Circuit Court in the Texas case had dismissed the suit on the ground that the guardian could not, by the laws of Texas, bring the suit in his own name as guardian, would not that present essentially the same question as that presented by the case at bar? Would this court then have dismissed the writ of error in that case, as it is asked to dismiss the appeal in this case, on the ground that the dismissal of the Texas case "was not based on a denial of the jurisdiction of that court as a Federal Court, but in the exercise of that jurisdiction?" Of course it would not.

The question in that case, to state it differently, was whether the guardian, as such, was a citizen of a different State within the meaning of the provisions of the Constitution and laws of the United States, conferring jurisdiction on the federal courts. That question depended on whether the guardian, as such, had power by the laws of Texas to sue in his own name. If he did have such power, then he was, as guardian, a citizen of a different State within the meaning of those provision. If he did not have such power, then he was not, as guardian, a citizen of a different State within the meaning of those provisions. Precisely the same question is presented in the case at bar, for here the question is whether a Wisconsin executor, as such executor, is a citizen of a different State from that of the plaintiff within the meaning of those provisions. This question is dependent upon whether or not such Wisconsin executor can be sued in the courts of Kentucky. If he can be sued there, then, as such executor, he is a citizen of a different State within the meaning of those provisions. If he can not be sued there, then, as such executor, he is not a citizen of a different State within the meaning of those provisions.

In the Texas case, if the guardian could sue, then the Federal Court, as such, had jurisdiction. If he could

not sue, then it did not have jurisdiction. In the case at bar, if the executor could be sued, then the Federal Court, as such, had jurisdiction. If he could not be sued, then it did not have jurisdiction. The question in the Texas case and the question in this case both necessarily involve the power of the Federal Courts, as such, over those classes of the citizens of different States. In the Texas case, this court held, in effect, that the guardian was a citizen of a different State within the meaning of the Constitution and laws of the United States conferring jurisdiction on Federal Courts, because he had the right, under the laws of Texas, to bring the suit in his own name as guardian. In the case at bar, the Circuit Court held, in effect, that this Wisconsin executor was not a citizen within the meaning of those provisions, because he could not be sued in Kentucky. It denied jurisdiction of the Federal Court, as such, over that class of citizens of different States composed of executors.

The case at bar is easily distinguishable from the case of Louisville Trust Company v. Knott, decided by this court November 30, 1903, and the cases discussed in that opinion. In that case the question was not one of power to act on the person or property of a particular class of citizens, as it is here, but it was a question as to which receiver, State or Federal, had the right to the possession of the property concerned.

This court there said:

> "In principle, the judgment in Smith v. McKay embraces the present case. The issue presented by the intervening petition did not raise any question under the Constitution or statutes of the United States, and depended only upon principles of general law applicable to all courts having concurrent jurisdiction over the same subject matter. We repeat that the jurisdiction of the Circuit Court was not and is not questioned for want of power in that court, as a Federal tribunal, to take possession of the assets and property of the Post Company; only its au-

thority, upon principles of equity and comity, to do that of which complaint was made by the Louisville Trust Company. We do not think that Congress intended that any such questions should be the basis of a direct appeal to this court from a Circuit Court."

In the case at bar, however, we think the power of the Circuit Court as a Federal Court was denied, by dismissing this suit, just as it was sustained in the Texas case.

III.

The third ground of the motion to dismiss is:

"Third. Because the power of the Circuit Court, as a Federal Court, to hear and finally determine all questions and issues involved in this case has not, in any way, been denied, controverted or put in issue."

In reply to this, we say that plaintiffs' motion to remand this case to the State court did necessarily deny, controvert and put in issue the power of the Circuit Court, as a Federal Court, to hear and determine this case. We are not aware of any law requiring the reasons for the motion to be stated in it, and we do not know of any way in which the plaintiff, in a removed case, can controvert the jurisdiction of the court other than by a motion to remand.

Again, the defendant's motion "to dismiss this cause for the want of jurisdiction to try same," and defendant Pradt's special demurrer because, "First, That the court has no jurisdiction of the person of this defendant. Second. That the court has no jurisdiction of the subject matter of the action," necessarily put in issue the jurisdiction of the court as a Federal Court.

IV.

The fourth and fifth grounds of the motion to dismiss are as follows:

"Fourth. Because no question of jurisdiction has

been certified by the Circuit Court to this court for decision, as required by the said Judiciary Act of March 3, 1891, section 5; and no application was made to said Circuit Court for such certificate."

"Fifth. Because no ground of jurisdiction of this court upon this appeal is shown in the record herein."

In the case of *In Re* Lehigh Min. & Mfg. Co. 156 U. S., 327, the court held:

> "But it is unnecessary to determine how this may be, as we think the district judge was quite right in holding that the question had already been sufficiently certified. The question involved was only the question of jurisdiction, and the judgment not only recited that for reasons in writing, filed as part of the order, the court considered that it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction; but the district judge certified in the bill of exceptions that it was 'held that the court did not have jurisdiction of the suit, and ordered the same to be dismissed;' and, in the order allowing the writ of error, certified in effect that it was allowed 'upon the question of Jurisdiction.'
>
> "We observed, in United States v. Jahn, 155 U. S., 109, 112, that 'the provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record."

In Shields v. Coleman, 157 U. S., 168, it was held that where the order of appeal recited "this appeal is granted solely upon the question of jurisdiction," and where the petition for appeal prayed "an order granting

an appeal from said final decree and interlocutory orders, taking and exercising jurisdiction as aforesaid, to the Supreme Court of the United States, as authorized by section 5 of the Act of Congress of the United States, approved March 3, 1891," that this was a sufficient certificate. The court there said, on page 176:

> "The single question presented by this appeal is that of the jurisdiction of the Federal Court to appoint a receiver, and take the railroad property out of the possession of the receiver appointed by the State court. In such cases, as was held in Maynard v. Hecht, 151 U. S., 324, it is essential that the question of jurisdiction alone should be certified to this court from the trial court. But under the authority of United States v. Jahn, 155 U. S., 109, and *In Re* Lehigh Company, 156 U. S., 322, the statement in the last order quoted from the record taken in connection with the petition upon which it was founded must be held to be a sufficient certificate. It is not necessary that the word 'certify' be formally used."

In Interior Construction Co. v. Gibney, 160 U. S., 219, this court said:

> "The record shows that the only matter tried and decided in the Circuit court was a demurrer to the plea to the jurisdiction; and the petition, upon which the writ of error was allowed, asked only for the review of the judgment that the court had no jurisdiction of the action. The question of jurisdiction alone is thus sufficiently certified to this court, as required by the act of March 3, 1891, c. 517, section 5, 26 Stat., 828; *In Re* Lehigh Co., 156 U. S., 322; Shields v. Coleman, 157 U. S., 168."

In Smith v. McKay, 161 U. S., 356, it is said:

"It is contended on the part of the appellee that we should dismiss this appeal because the question of jurisdiction is not properly certified to this court."

"The record discloses that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdicton, and prayed that their appeal should be allowed, and *the question of jurisdiction* be certified to the Supreme Court, and that *said appeal was allowed.* The certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and as part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied. It, therefore, appears that the appeal was granted solely upon the question of jurisdiction, and this brings the case within the rulings in Shields v. Coleman, 157 U. S., 168, and *In re* Lehigh Mining Co., 156 U. S., 322."

In Huntington v. Laidley, 176 U. S., 676, it is said:

"In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction. This may appear in either of two ways, by the terms of the decree appealed from and of the order allowing the appeal; or by a separate certificate of the court below."

In Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S., page 285, the court said:

> "As the appeal was taken directly to this court, it must appear, under the fifth section of the Court of Appeals act, either that the question of jurisdiction was certified to this court, or that the decree appealed from shows upon its face that the sole question decided was one of jurisdiction."

In the case at bar, the whole record has been filed and printed. The final decree dismissed the suit for want of jurisdiction. It is in the following language:

> "This cause having been heard and submitted on the plaintiff's motion to remand this case to the State court, and on the defendant's demurrer to the jurisdiction of this court, and the motion of defendants to dismiss this case for want of jurisdiction in this court, and the court being fully advised, it is ordered that plaintiff's motion to remand this case to the State court be and it is hereby overruled, to which plaintiff excepts."
>
> "It is further ordered, adjudged and decreed that defendant's demurrer to the jurisdiction of this court and motion to dismiss this suit for want of jurisdiction in this court, be and the same are hereby sustained, and that this suit be and the same is hereby dismissed for want of jurisdiction in this court. And thereupon came plaintiff in open court and filed his petition for an appeal and assignment of errors, and prayed an appeal to the Supreme Court of the United States from this final decree in dismissing said suit for want of jurisdiction in this court, which appeal is hereby allowed upon the execution of a bond in penalty of $500.00 by plaintiff, M. H. Courtney, with good and sufficient security that appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to

make his plea good, which bond shall operate as a supersedeas."

It shows upon its face that the suit was dismissed "for want of jurisdiction in this court." It shows further upon its face "that plaintiff prayed an appeal to the Supreme Court of the United States from this final decree in dismissing said suit for want of jurisdiction in this court, which appeal is hereby allowed."

The petition for the appeal, both opinions of the court, and in fact, every step in the record shows that the sole question considered was the question of jurisdiction in the Circuit Court. Of course, the record shows several contentions in regard to this jurisdiction. The motion to remand and the court's first opinion show plaintiff's contention that the court did not have jurisdiction, because the defendants were before the court by constructive service only, and because this was a common-law suit made a suit in equity by the State Statutes, and could not, therefore, be tried by a Federal tribunal. Defendants' motion to dismiss, defendant Pradt's special demurrer, and both opinions of the court show defendants' contentions that the Circuit Court had no jurisdiction, and the grounds on which these contentions were based. While the special demurrer does contain in its third, fourth, fifth and sixth causes of demurrer, other causes than that of jurisdiction, yet the opinions of the court and the final decree show that the other grounds were not considered, and that the sole question decided by the court was that of jurisdiction. The decree shows that the case was "heard and submitted on the plaintiff's motion to remand this case to the State court, and on defendant's demurrer to the jurisdiction of this court, and the motion of defendants to dismiss this case for want of jurisdiction in this court," and the whole record shows that these were the only matters, at any time, heard, submitted or decided. These involved the single question of whether or not the court had jurisdiction.

For the reasons herein urged and upon the authori-

ties cited, the appellant submits that this court has jurisdiction of the appeal herein, and that the motion to dismiss it should be denied.

Respectfully submitted,

ALEX. POPE HUMPHREY,
Counsel for Appellant.

BRECKINRIDGE & SHELBY,
W. B. DIXON,
Of Counsel.

FILE COPY

No. 98

Supreme Court of the United States.

M. H. COURTNEY, *Appellant*,

vs.

LOUIS A. PRADT, Executor of Maurin B. Atwater, deceased, and WM. C. ATWATER, *Appellees*.

BRIEF FOR APPELLANT.

ALEX POPE HUMPHREY,
WILLIAM BULLITT DIXON,
Counsel for Appellant.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

No. 871.

Supreme Court of the United States.

M. H. COURTNEY, - - - - - - - - - - - - *Appellant,*

vs. **BRIEF FOR APPELLANT.**

LOUIS A. PRADT, EXECUTOR OF MERRITT B. ATWATER, DECEASED, AND WM. C. ATWATER, *Appellees.*

STATEMENT.

This suit was brought by M. H. Courtney, a citizen of Kentucky, against Louis A. Pradt, Executor of M. B. Atwater, deceased, a citizen of Wisconsin, and Wm. C. Atwater, a citizen of Illinois, in the Powell Circuit Court, and jurisdiction obtained by warning order and attachment. It was removed by defendants to the United States Circuit Court for the Eastern District of Kentucky. Thereupon, plaintiff moved to remand the case to the State Court, and defendants entered their appearance specially and moved to dismiss it for want of jurisdiction, and defendant, Louis A. Pradt, Executor, filed a special demurrer containing various grounds, among them that the court had no jurisdiction. The Circuit Court dismissed the suit on the ground that it had no jurisdiction, and plaintiff has appealed from that decree to this court.

The facts disclosed by the petition (Printed Record, page 1), which are confessed by the demurrer and motion to dismiss, are that M. B. Atwater & Co., a firm composed of M. B. Atwater and Wm. C. Atwater, are indebted to plaintiff, M. H. Courtney, in the sum of eight thousand dollars ($8.000) by an express contract, which sum plaintiff seeks to recover by this suit. M. B. Atwater died in 1898, having made a will, which

was probated in Wisconsin, and by which he appointed the defendant, Louis A. Pradt, his executor, who qualified there and is still acting as such executor. The Atwater & Allen Land & Lumber Company, the garnishee, is a corporation organized in Wisconsin, with power to buy, sell, own, and hold real estate in the State of Kentucky, and all of its assets consisted of real estate in the State of Kentucky. In August, 1901, it sold this real estate and realized therefrom a large sum of money. The only business ever transacted by this corporation was buying, holding, and selling this real estate in the State of Kentucky. It is alleged (R. 3) that M. B. Atwater, "at the time of his death, owned stock in said corporation, and plaintiff states that said corporation now owes to the defendant, Louis A. Pradt, executor of Merritt B. Atwater, deceased, a large sum of money as such executor. That the chief office and place of business of said corporation in the State of Kentucky is in Clay City, Powell County, Kentucky, and that said corporation has an agent resident there, upon whom summons can be served." The petition then contains the usual affidavits for an attachment and warning order against the defendants, and there is filed a separate affidavit with the petition verifying plaintiff's claim, as required under Section 2870 of the Kentucky Statutes. The petition then alleges "plaintiff knows of and states that there are no other creditors in the State of Kentucky of the said Merritt B. Atwater, deceased, and plaintiff states that there are assets in the hands of Louis A. Pradt, executor of Merritt B. Atwater, deceased, and assets of the estate of Merritt B. Atwater, deceased, in the State of Wisconsin, exclusive of the stock held by him in said corporation, and exclusive of the indebtedness of said corporation to said executor, more than sufficient in value to pay all of the debts of said estate, owing to creditors of said Merritt B. Atwater, outside of the State of Kentucky."

It is further alleged (R. 4) "that said William C. Atwater is insolvent; that the said will of Merritt B. Atwater has not

been probated in Kentucky, and that it would be unjust and inequitable to this plaintiff to permit said executor to collect, or withdraw, any of said assets arising from the sale of the said real estate in Kentucky, and distribute them under said will in a foreign jurisdiction until after plaintiff's claim against the estate of M. B. Atwater, deceased, and against said William C. Atwater, is paid in full; and that unless an attachment is granted plaintiff herein, and said assets attached and subjected by the Court to plaintiff's claims herein, they will be collected by said executor and withdrawn from the jurisdiction of this State and distributed in a foreign jurisdiction, and plaintiff will be without remedy."

This petition having been sworn to by plaintiff and filed, a warning order was issued against defendants (R. 5), and upon the execution of a bond by plaintiff an attachment issued. This was served on the Atwater & Allen Land & Lumber Co., the garnishee, who answered (R. 7), admitting that it was indebted to defendant Pradt as executor of M. B. Atwater, deceased, in the sum of $4,557.37—which sum it is holding awaiting the decision of the Court—that being the dividend declared on the stock in said corporation owned by M. B. Atwater at his death and still in his name on the books of the Company.

In appellant's brief on the motion to dismiss the appeal herein, it was argued, first, that defendants were before the Court only by constructive service of process; that as there was no actual service upon them, and no entry of appearance on their part, the United States Circuit Court had no jurisdiction to proceed in the cause, and should have remanded it to the State Court, where it originated. Second, that if the special demurrer filed by the defendant, L. A. Pradt, executor, was equivalent to his entering his appearance in the cause, still the nature of the suit against him was such that the Circuit Court could not proceed with it, it being a common-law suit, with an attachment against him, a non-

resident—the Kentucky Code giving exclusive jurisdiction to courts of equity of attachment suits against non-resident defendants—and for this reason the circuit court should have remanded the cause to the State Court. Third, that dismissing this suit for want of jurisdiction on the ground that by the laws of Kentucky a Wisconsin executor could not be sued in Kentucky, necessarily involved the question of the jurisdiction of the Circuit Court as a Federal tribunal.

There remains to be argued in this brief, the question whether or not the laws of Kentucky authorize a suit of this character against a foreign executor. If they do, then the decree of the Circuit Court dismissing this suit for want of jurisdiction was erroneous.

ARGUMENT.

It was conceded by appellees in the Circuit Court that it had jurisdiction, if the State Court had jurisdiction. This was obviously correct, unless jurisdiction was wanting and the case should have been remanded for the reasons set out in the first and second propositions stated above, as argued in appellant's brief on the motion to dismiss the appeal. Appellees contended in the Circuit Court that the State Court did not have jurisdiction on two grounds: (1). Because defendants were non-residents before the Court by constructive service only, and the corporation garnisheed was a foreign corporation. (2). Because a foreign executor could not, by the laws of Kentucky, be sued in Kentucky, or the estate of his decedent be attached.

Appellant insists that neither of these grounds is tenable, and maintains the contrary propositions as follows: (1). The statutes of Kentucky authorized the garnishment of the foreign corporation, and the Court acquired jurisdiction of the debt owing by it, notwithstanding the defendants were non-residents and before the Court by constructive service only. (2). The statutes of Kentucky authorized this suit against the foreign executor and the attachment of any assets of his decedent's estate, which might be levied on or garnisheed in Kentucky. These propositions will be discussed in their order.

I.

The Statutes of Kentucky authorized the garnishment of the foreign corporation and the Court acquired jurisdiction of the debt owing by it, notwithstanding the defendants were non-residents and before the Court by constructive service only.

This was decided by the Kentucky Court of Appeals in the recent case of Pittsburg &c. Railway Co. v. Bartels, 108 Ky. 216. One of the statutes under consideration in that case was Section 571, Ky. Statutes, which provides "All corporations,

except foreign insurance companies, formed under the laws of this or any other State, and carrying on any business in this State, shall at all times have one or more known places of business in this State and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State, until it shall have filed in the office of the Secretary of State a statement, signed by its President or Secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents thereat upon whom process can be served." This section then provides that a failure to comply with its provisions shall be a misdemeanor and the corporation and its agents and employes may be indicted and fined not less than $100.00 nor more than $1000.00 for each offense. This section was enacted in obedience to Section 194 of the present Constitution of Kentucky, which is as follows:

> "Sec. 194. All corporations formed under the laws of this State, or carrying on business in this State, shall, at all times, have one or more known places of business in this State, and an authorized agent or agents there, upon whom process may be executed, and the General Assembly shall enact laws to carry into effect the provisions of this section."

It will be observed that the provisions of both the Constitution and statute apply alike to all corporations, whether organized in Kentucky or elsewhere. The attachment in the case at bar was served on the authorized agent of the Atwater & Allen Land & Lumber Company.

It will be seen from the opinion in the Bartels case, that there, the defendant was a non-resident before the Court by constructive service only, and the corporation garnisheed was a foreign corporation, just as in the case at bar. The Court there said:

> "One Gilhooley was indebted to the appellee, Bartels, on a promissory note. The appellant railway company is a foreign corporation doing business in this

State. It was indebted to Gilhooley. This action was brought by Bartels against Gilhooley, and an order of attachment was obtained and executed upon the railway company for the purpose of compelling it, as garnishee, to pay the sum due Gilhooley to the plaintiff. As Gilhooley and the garnishee are non-residents, and the debt due from the garnishee to the debtor being payable in Indiana, and, although Bartels is a resident, it is contended that the court did not have jurisdiction to subject the debt attached to the payment of the plaintiff's demand.

"We are aware that there is some conflict between the authorities upon the question here involved, but we are of the opinion that the weight of authortities hold that the Court has jurisdiction to subject the debt to the payment of the plaintiff's demand. At any rate, the best reasoned cases take that view of the law. Non-resident corporations, under our law, are placed upon the same footing as domestic corporations. The law requires that they shall have an agent in the State upon whom process can be served. They have no right to do business in the State without having an agent or officer upon whom process can be served. They are required, in other words, to submit to the jurisdiction of the Courts of this State. They get the protection of the laws of this State, and are authorized to transact business as do similar domestic corporations, and they should not be heard to complain because they are compelled to abide by the laws of this State in matters of procedure and remedy. Gilhooley did not file an answer in the case. He was brought before the Court by constructive service. It is the railroad company that is here complaining because the Court adjudged that it should pay the money in its hands to satisfy the plaintiff's demand. Under our Code of Practice, non-residency of a debtor is a ground for an attachment. Section 203, Civil Code of Practice, designates how an order of attachment shall be served. Subsection 1 of that section provides how an attachment shall be served upon real property, subsection 2 as to how it shall be served upon personal property capable of manual delivery, and subsection 3 reads as follows: 'Upon other personal property, by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or as to a debt or demand, to the person owing it. . . . '

"Section 225 of the Code provides that if a garnishee, or officer of a corporation summoned as a garnishee, appear in person, he may be examined on oath; and if it be discovered on such examination that, at the service of the order of attachment upon him, he or the corporation was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property, and the payment, or security for the payment, of the sum owing by the garnishee into court, etc. The language of these Code provisions shows that the legislature intended them to apply to all corporations,—foreign as well as domestic. The language does not suggest that there is to be an exception in case a foreign corporation should be indebted to a non-resident, and it is summoned as a garnishee.

"There is no question but what the debtor in this case could have come into Kentucky, and sued the railroad company to recover the amount which it owed him. The courts here would have been open to have granted such relief. If he was entitled to maintain such action, why is not his creditor, especially one who is a resident of the State, entitled to maintain an action to compel the railroad company to pay what it owes the debtor into court, to await its judgment, or to the plaintiff? The courts of Kentucky have universally recognized the right of a creditor to sue his non-resident debtor here, and attach money due him in the hands of a resident. When a foreign corporation comes into the State, and does business here, and can be sued in Kentucky, it ought to submit to the procedure and remedy of the courts of Kentucky, as a domestic corporation would be compelled to do under similar circumstances."

The court then reviews a number of authorities as sustaining its position, among them, Railway Co. v. Thompson, 31 Kan. 194, where it is said:

"A mere debt is transitory, and may be enforced wherever the debtor or his property may be found; and, if the creditor can enforce the collection of his debt in the courts of this State, a creditor of such creditor should have equal facilities."

It also quotes from Mooney v. Union Pacific R. R. Co., 60 Ia. 346, a part of which is as follows:

> "As is said in Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109, attachment laws 'necessarily assume that property has a situs entirely distinct from the owner's domicile.' . . . And we think if the defendant, Rollins, could have maintained an action against the appellant in this State for the recovery of his wages, it follows that the debt was within this State, and subject to attachment. Whether he could have maintained such action does not depend upon the question as to the custom to make payment in Nebraska, but whether appellant was subject to the jurisdiction of the courts of this State."

The conclusion reached in this case is based on sound reason; for an attachment is in the nature of a proceeding *in rem*, and as a debt is intangible and can not be physically levied on, the way, and the only way, that a court can obtain jurisdiction or control of it, is to obtain jurisdiction or control of the person of the debtor. Through the person of the debtor the court can control the debt as completely and effectually as if it were tangible property *in custodia legis*.

As held by this court in Chicago, &c., Railway v. Sturm, 176 U. S. 710, it is not at all necessary to resort to the legal fiction that a debt has a *situs;* for a debt is transitory and payable everywhere. The real thing, stripped of legal fiction, is, that jurisdiction over the debt is obtained when the court obtains jurisdiction of the person who owes it, for then the person who owes it has been notified by the court's process not to pay it to the creditor, but to hold it subject to the court's order, and the court has power to enforce its order by acting, if necessary, on the person of the debtor. This court, in the above case, used this language:

> "A notice to the debtor must be given, and can only be given and enforced where he is. This, as we have already said, is a necessity, and it can not be evaded by the insistence upon fictions or refinements about *situs* or the rights of the creditor. Of course, the debt is the property of the creditor, and because it is, the law seeks to subject it, as it does other property, to the payment

> of *his* creditors. If it can be done in any other way than by process against and jurisdiction of his debtor, that way does not occur to us."

The Kentucky Court of Appeals, in the Bartels case, has construed the statute passed in obedience to the Constitution of Kentucky, as giving jurisdiction to Kentucky Courts of the debtor, where it is a foreign corporation with an agent in the State upon whom process can be and is served. That such construction is binding on the United States Courts, has been held by this court in Morley v. Lake Shore Railway Co., 146 U. S. 166, 167, and cases there cited, and New York, &c., Railway Co. v. Estill, 147 U. S. 591. The Bartels case is therefore a complete answer to the first contention of appellees; and appellant submits that the State Court, by virtue of the warning order against defendants and service of attachment on the foreign corporation, acquired jurisdiction of the defendant, executor, to the extent of the indebtedness admitted by the garnisheed corporation to be owing from it to him.

II.

The Statutes of Kentucky Authorized this Suit Against the Foreign Executor, and the Attachment of any Assets of his Decedent's Estate which might be Levied on or Garnisheed in Kentucky.

The statute, which appellant claims authorizes an attachment against a foreign executor, is Section 194 of the Kentucky Code of Practice, which is in this language:

> "Sec. 194. *Grounds of attachment generally.*—The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as provided in Sec. 227, as a security for the satisfaction of such judgment as may be recovered.
>
> "I. In an action for the recovery of money against—

"1. A defendant, who is a foreign corporation, or a non-resident of the State; or,

"2. Who has been absent herefrom four months; or,

"3. Has departed herefrom with intent to defraud his creditors; or,

"4. Has left the county of his residence to avoid the service of a summons; or,

"5. So conceals himself that a summons can not be served upon him; or,

"6. Is about to remove, or has removed, his property, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim, or the claims of said defendant's creditors; or,

"7. Has sold, conveyed, or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder, or delay his creditors; or,

"8. Is about to sell, convey, or otherwise dispose of his property, with such intent. But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this State, for any claim other than a debt or demand arising upon a contract, express or implied, or a judgment or award."

From a mere reading of this section, it is evident that the Legislature in saying "the plaintiff may . . . have an attachment against the property of the defendant," selected the broadest possible language to describe the persons against whose property an attachment might be issued on the grounds named. The word "defendant" used in the statute is generic, and embraces all classes of persons, natural and artificial. There is no suggestion anywhere in the statute that executors, administrators, or any class of persons was intended to be excepted.

Appellees insist, however, that there must be inserted in this statute an exception in favor of executors and administrators and especially foreign executors; because, they say, an attachment gives a lien or preference, while the administration statutes require a ratable distribution of the decedent's estate; and, they say, a foreign executor can not be sued at all in Kentucky.

But before this statute was enacted the Kentucky Court of Appeals had decided repeatedly that the estate of a decedent could be attached; and that in such suit, the non-resident heirs, distributees, or legatees could be made defendants in place of the administrator, or executor, where none had qualified in Kentucky, or elsewhere. That court had also decided that a foreign executor or administrator could be sued in Kentucky. That court had also decided that a similar statute, in which the word "defendant" was used to designate the classes of persons whose property might be attached, did embrace executors and administrators, notwithstanding the administration statutes then in force were substantially the same as those of to-day. With these decisions before the Legislature—defining the word "defendant," in a similar attachment statute as embracing executors and administrators, and deciding that a foreign executor or administrator could be sued—it can not be presumed that that body intended by using the same word which had been held to *embrace* them, to *except* executors and administrators. An examination of these prior laws in force in Kentucky, and of the changes made by the Legislature, will be convincing that the present statutes authorize the suit and attachment in this case.

Looking first at the administration laws, it was not only possible, but it was a common thing until modern times for the creditor of a decedent to obtain a preference in the payment of his debt out of decedent's estate. He could do this, by being the first to recover a judgment in an action at law, or the personal representative might elect to prefer him. Williams on Executors, 3d American Ed., Vol. 2, 887.

This seems to have been the law in Kentucky until the act of 1839 was passed. It was, however, modified by the act of 1811, which provided, Section 2, that no suit should be brought against an executor or administrator until six months after his qualification; and Section 3, "That no executor or administrator shall be permitted, within such term of six

months after he, she or they may have qualified as such, to confess any judgment, or judgments, so as to give to any claim or claims a superior dignity to any other claim or claims, against the estate of their testator or intestate." 1 Statute Law of Kentucky, 673.

In Pope v. Wickliffe, 7 Mon. 413, the court held that this act did not prevent the executor or administrator from paying any creditor of the testator or intestate in full within the six months: that if the whole estate were used up by paying part of the claims in full, the other creditors had no recourse upon the executor or the administrator. So it was possible, even under this act, for a creditor to be preferred at any time.

Looking now at the former attachment laws, we find that Williams on Executors, 3 American Ed., Vol. 2, page 1711, says:

> "Executors and administrators are within the custom of Foreign Attachments: and, therefore, if a plaint be entered in the Court of the mayor or sheriff of London against an executor or administrator, the plaintiff may attach money or goods belonging to the deceased in the hands of another within the City."

In Chicago, &c., Railway v. Sturm, 174 U. S. 714, this court said: "Our attachment laws had their origin in the custom of London."

In Kentucky, it was held in Pilkington's Executrix v. Gaunt's Administratrix, 5 Dana, 410, that on a return of no property upon an execution against the estate of a decedent, a debt due to the administratrix in her representative capacity could be attached, and subjected to plaintiff's demands. This was also held in the case of Montmollin v. Gaunt's Administratrix, 5 Dana, 406. Both of these decisions were rendered in 1837, two years prior to the passage of the act of 1839. That act (3 Statute Law of Kentucky, 240), entitled "An Act to regulate the administration and settlement of estates," for the first time provided for the payment of debts ratably; but that ratable distribution was required in the single event that the

personal estate of a decedent was insufficient to pay them in full. By comparing this act with the present statutes, it will be seen that they are substantially the same in all of their provisions material to the questions here.

Section 1 provided, "That, hereafter, all debts shall be of equal dignity in the administration of estates, and shal be paid as hereafter declared ratably, in proportion to their amounts, by the executor or administrator, when the personal effects are not sufficient for the payment of the debts against the estate of the testator or intestate; and should more than the ratable share of any debt be paid, the executor or administrator shall only receive credit, in the settlement of his accounts, for its proper proportion."

Section 4 provided that burial expenses, costs and charges of administration, and the amount owing from decedent on account of an estate of a ward, idiot, lunatic or decedent, committed to him by a court of record, should be paid in full before any *pro rata* distribution should be made.

These two sections are substantially the same as section 3868 of the present Kentucky Statutes, which is as follows:

> "Sec. 3868. *Preferred debts—pro rata distribution.* If the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent, and the cost and charges of the administration of his estate, and the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to, and remaining in the hands of a decedent, shall be paid in full before any *pro rata* distribution shall be made; but this preference shall not extend to a demand foreign to this State. All other debts and liabilities shall be of equal dignity, and paid ratably in the administration of his estate; and should more than the ratable share of any debt be paid, his personal representative shall only receive credit for its proper proportion."

Section 2 of the Act of 1839 gives the executor or administrator the right to file a bill in Chancery "where he shall be satisfied and so state in his bill that the estate is not suffi-

cient to pay all of the debts of the decedent," making the heirs, devisees, legatees, distributees and creditors of the decedent so far as known defendants.

The section then provides for referring the case to the Master to report to the court the debts against the estate, and that "the court may order the debts proved, to be paid ratably in proportion to the personal assets and slaves."

Section 5 gave the court "full power and authority to enjoin proceedings at law, and to take all necessary and proper orders for carrying this act into effect."

It also gave to any creditor, heir, devisee, legatee, or distributee the right to file a bill against the executor or administrator and the other creditors, heirs, devisees, legatees, or distributees for the settlement of the estate, and provided for similar orders and proceedings as if the bill had been filed by an executor or administrator.

Section 428, Chap. 3, Title X, of the present Kentucky Code of Practice, provides:

> "A representative, legatee, distributee, or creditor of a deceased person may bring an action in equity for the settlement of his estate."

Section 732 of the Code provides:

> "In construing the provisions of this Code, these rules shall prevail, unless a different intention be expressed, or be shown by the context:
> "18. The words 'real representative' mean the heir or devisee of real property of a deceased person.
> "19. The word 'representative' includes personal and real representatives."

The same persons, therefore, who could have brought the settlement suit under the act of 1839, can now bring it.

Section 436, Ch. 3, Title X, of the present Code, provides:

> "Upon the institution of the action mentioned in this chapter, an order may be made enjoining the prosecution of actions against the representatives of a decedent

> by creditors, for their demands. But such enjoining shall not be made, unless the action for the settlement of the estate be commenced within three years after the qualification of the personal representatives."

The same persons, therefore, who could have obtained an injunction in the settlement suit under the act of 1839, can obtain the injunction in the settlement suit under the present Code.

It is thus seen that the act of 1839 is substantially the same in all of its material provisions bearing on the question whether a decedent's estate can be attached, as the statutes in force today. Yet, under this act, the Kentucky Court of Appeals decided repeatedly that the estate of a decedent could be attached.

In Peterson v. Poignard, 6 B. M. (Ky.) 570, the Court held:

> "If the jurisdiction of the Chancellor in this case rested solely upon our statutes authorizing attachments in Chancery against the effects of non-resident debtors, we should even then be of opinion according to the case of Hefferman v. Forward, &c., decided at the present term, that as Monroe, the primary debtor of Peterson, has been dead for many years, insolvent and without administration, his heirs may in equity and for the purpose of effecting the remedy, be regarded as his representatives, qualified to contest any demand set up against him, and through whom his personal estate, existing in the form of choses in action, may be rendered subject to his debts."

In Hefferman v. Forward, 6 B. M. (Ky) 567, the facts were these:

Forward took from the possession of one Carrell a negro girl, claiming her as his own, and sold her. Carrell died, leaving a widow and two infant children, who removed from the State. Twelve months having expired without administration upon Carrell's estate, Hefferman filed his bill against Forward and the widow and unknown heirs of Carrell, to subject the

slave or her value to the payment of the demand which he set up against the estate of Carrell. The Chancellor dismissed his bill for want of jurisdiction, but the Court of Appeals reversed that judgment, holding that there was jurisdiction. It further held " . . . in a proceeding in chancery against non-residents under our statutes, that the heirs may be so far regarded as representative of the personalty as well as realty, as to authorize the proceedings against them as non-residents, in the absence of any duly appointed personal representative."

The only "proceeding in chancery against non-residents under our statutes," was then, and is now, by attachment, and this was evidently an attachment suit. The statute referred to by the court is the act of 1837, found in Session Acts, page 103, and is quoted on page 10 of appellant's brief on the motion to dismiss the appeal herein. That this was an attachment suit is also conclusively shown by the quotation in reference to it from Peterson v. Poignard, *supra*.

The court says further :

> "It would seem to be hard, therefore, and contrary to the spirit of our statutes authorizing the proceeding against non-resident debtors, etc., when the fund sought to be subjected is within the power and jurisdiction of the court, that the creditor should not be allowed to proceed against it, making all persons interested against the debt, and in the fund sought to be subjected, parties, merely because an administrator or personal representative, in whom, if appointed, the *naked* legal title would vest, has not been appointed, and therefore can not be made a party. . . .
>
> "It is true the creditor might take out letters of administration here, and in that character sue for and recover the fund sought to be subjected, or bring an action *de son tort* against the person intermeddling with the estate, and in one of these forms of proceeding he might, perhaps, be enabled to reach the fund here, sought to be applied to the payment of his debt. We do not regard either of those modes of proceeding *as an ordinary legal remedy*, which should preclude the inter-

> ference of the chancellor, in behalf of the creditor, *under the statutes referred to.*"

The court then gives several reasons why the creditor is not forced to have an administrator appointed, and why he is entitled to attach, and among them, this:

> "Besides the personalty might, in the meantime, be sent out of the State to the non-resident heirs, or the debt paid over to them or to some foreign administrator, and the fund, which should be made liable to the creditors here, escape from the power and jurisdiction of the Chancellor."

This is exactly what the petition in the case at bar alleges will happen to the fund here, unless it is subjected by the attachment.

Both of these cases were decided in 1846, about seven years after the administration act of 1839 was passed.

In Davis v. Connelly's Executor, 4 B. M. (Ky.) 136, the Court held that a foreign executor might be sued. In that case suit was brought in Kentucky, upon a judgment obtained in Ohio, against Kentucky executors of a Kentucky testator. These executors pleaded to the Kentucky suit, "that they were never appointed, qualified or admitted as such, in any Court or judicial tribunal in the State of Ohio, nor did their testator at the time, or after his death, leave assets or estate there; that the proceedings in the record in the suit declared on, were had in the State of Ohio against them as executors under the laws and within the jurisdiction of Kentucky," etc., and they claimed that the judgment against them was void because the Ohio Court had no jurisdiction to render it. It was held that this judgment was valid on two grounds: First, that executors qualified in Kentucky were executors *everywhere*, and might be sued in Ohio. Second, that having been proceeded against in Ohio as executors of Connelly and having entered their appearance in that suit as his executors, they were estopped to deny that they were his executors in Ohio. Upon the first ground the Court said:

"It is not pretended that the Court of Ohio had no jurisdiction to ascertain and adjudge the debt in question, if there were before it proper parties against whom as representatives of the deceased debtor it might be adjudged; nor is it in any manner denied that the defendants were actually before the Court, either by appearance or service of process; nor that the Court had full jurisdiction of the case and the proceeding, if they, the defendants, could be there regarded as the executors of the debtor, and proceeded against as such. And to show that this could not be, they aver that they had never qualified, etc., in Ohio, but were there foreign executors merely. And why may not a foreign executor be proceeded against in Ohio or any other State? An executor derives his authority from the will and not from the Court which grants the probate or letters testamentary. These are but the *evidences* of his right and character, and *not their cause or basis*. Having shown his election to receive the appointment by qualifying in one State, *he is executor everywhere*, and may act as such, in many respects, in other States; Fletcher's administrator v. Wier, etc. (7 Dana, 347). And as an executor, who has elected to administer, may even be sued before probate (Williams on Executors, 165), why may not an executor, who has elected to administer by qualifying in the State of the domicil, be sued in any other State, without probate or formal qualification there? . . . . .

"As executors qualified in Kentucky, they were, in fact, the representatives of the testator in Ohio."

In Atchison's Heirs v. Lindsey, 6 B. M. (Ky.) 86, it was held that although Lindsey was appointed administrator in South Carolina, and received the assets there, he could still be sued in the courts of Kentucky, and made to account for the surplus remaining in his hands at the suit of a local administrator and infant heirs of decedent. It was contended in that case that he was accountable only to the courts of South Carolina, where he was appointed administrator and received the assets. In response to that contention, the court said:

"As administrator, appointed in South Carolina, Lindsey is unquestionably amenable to her laws for his

administration of the assets found there, and is liable to be called to account there for his conduct as administrator. And although the Courts of this State may not undertake to enforce the laws of that State in this respect, they are bound to give him the benefit of them, by paying due respect to the decree of any Court of that State in the premises, and to any law of that State which may prescribe the duties of the administrator. But we do not concede, that because he was appointed administrator there, and received the assets there, he can not be held responsible to any extent, and under any circumstances, in the tribunals of this State, for the surplus remaining in his hands, and to which citizens of this State are, according to all laws, justly entitled. In the case of *Campbell* v. *Tousey*, (7 Cowan, 64), the Supreme Court of New York decided that a foreign executor coming into that State, might be sued there, and held responsible for assets in his hands in that State. In Pennsylvania the same doctrine is understood to have been maintained, in the cases of *Swearingen's Executors* v. *Pendelton's Executor* (4 Sergeant & Rawle, 389–392), *Evans* v. *Tatem* (9 do. 252–259), and *Bryan* v. *McGee* (2 Wash. Cir. Ct. R. 337). And in this Court, the cases of *Hopkins* v. *Towns* (4 B. Monroe, 124), and *Davis* v. *Connelly's Executor* (Ib. 140), seem to incline to the same doctrine. Other authorities of great weight are of a contrary tenor. But the case of *Dorsey's Executors* v. *Dorsey's Administrators* (5 J. J. Marshall, 230), decided in this Court, is directly in point to the present question, since it decides explicitly that the distributee of the decedent may enforce distribution here, if the Maryland administrator shall have removed and settled in this State (p. 282).

"Upon the express authority of this case, and under our own sense of what is required by convenience and justice, and of the comity due to the sovereignty and laws of South Carolina, we are of opinion that the mere fact that Lindsey was appointed administrator in that State, and received there the assets for which he is now charged, does not of itself exempt him from all liability to be sued in the tribunals of this State, for a claim growing out of his having thus received the assets, to the proceeds of which the complainants or some of them are entitled."

In Sherwood v. Campbell's Administrator, 1 B. M. (Ky.) 54, the court construed a statute, in which the word "defendant" was used to designate the classes of persons whose property might be attached, as embracing executors and administrators, and upheld the attachment in that case notwithstanding the administration act of 1839. The opinion in full is as follows:

> "It is the opinion of this Court, that the statute of 1838 (Session Acts, 165), conferring on justices of the peace equitable jurisdiction to subject, in a summary mode by summons, choses in action to the satisfaction of judgments under L 5 (extended to $50, by an act of 1840, Session Acts, 75), applies as well to a judgment against an administrator or executor as any other person. Both the letter and the object of this beneficial enactment apply equally to all judgments whenever there has been a proper return of *nulla bona*.
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> "It is also our opinion that the Statute of 1839 (Session Acts, 295), entitled 'An Act to regulate the administration and settlement of estates,' does not affect the equitable remedy given by the act of 1838 for enforcing a judgment against a personal representative, unless such fiduciary, apprehending a deficit of assets, shall have instituted the comprehensive suit authorized in that event by the act of 1839, or unless some creditor had instituted the like suit in equity, as prescribed by the fifth section of the said act, and thereby all other remedies by any other individual creditor had been enjoined. Should there be a deficit of assets a proceeding under the act of 1838, or a judgment rendered thereon might still be enjoined.
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> "Wherefore, we are also finally of the opinion that the Circuit Court erred in deciding in this case, on the appeal from the justice's judgment, that the equitable remedy prescribed by the act of 1838 does not apply to a judgment against an administrator, some of whose debtors for chattels purchased at a sale of the intestate's goods had, according to the provisions of that enactment, been cited by Sherwood after a *fi. fa.* on a judgment he had obtained for $50, against Campbell's administrator, had been returned 'no property.'
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> "Wherefore, the judgment is reversed and the cause remanded."

The equitable remedy given by the act of 1838, referred to in this opinion, consisted in a garnishment proceeding against the debtor of the defendant. The act did not say that the executor or administrator might be defendant in such proceeding. It simply described the person whose debt might be garnisheed as the defendant. Thus, section 1 provided:

> "Section 1. Be it enacted, etc. That, hereafter, when the plaintiff or plaintiffs in an execution, which shall have been returned no property found to make the debt, or any part mentioned in said execution, when the same shall not exceed five pounds, may require the justice of the peace from whom said execution issued, to issue a summons against any person or persons who may be indebted to the defendant in said execution, to appear before him and answer, on oath, to the amount he, she or they may be owing to said defendant or defendants, or either of them, in said execution, and that said justice shall then make any order or orders that he may deem right, so as to secure the payment of the plaintiff's debt from the person or persons so summoned, provided the same shall be owing."

Section 2 provided:

> "That the defendant, or defendants, in said execution, shall be summoned to appear at the same time that the person so garnisheed shall be summoned to attend," etc.

This is the only description contained in the act of the persons whose debtors might be garnisheed, and yet the Court of Appeals decided that this description did embrace executors and administrators as well as any other person. This particular statute applied to justices of the peace only.

After that decison had been rendered, the Legislature of Kentucky changed the wording of the attachment statute, then in force, which gave jurisdiction to courts of chancery of attachments against non-residents. This statute—the act of 1837, Session Acts, page 103, section 1—described the person whose property might be attached as "person or persons, copartnership or corporation, who, or some of whom, are non-

residents of this State, or absent from the same, or the officer or officers of the corporation, who ought to be served with process, are 'non-residents of the State or absent from the same." (This section is quoted in full in Appellant's brief on motion to dismiss the appeal, page 10.) This statute, as changed by the legislature, is section 242 of the first Code of Practice, enacted March 22, 1851, and is in the following language:

> "Sec. 242. The plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant, in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered:
>
> "First. In an action for the recovery of money where the action is against:
>
> "1. A defendant, or several defendants, who, or some one of whom, is a foreign corporation, or a non-resident of this State, etc."

This, then, is the same description of the parties whose property may be attached as that contained in the act applicable to justices of the peace and construed in Sherwood v. Campbell's Admr. This is also the same description found in the present Code of Practice.

With the above decisions fresh before it—holding that the estate of a decedent could be attached; that a foreign executor or administrator could be sued; that where no executor or administrator had qualified, the non-resident heirs, distributees, or legatees could be made defendants in his stead and the estate be attached; that the word "defendant" in an attachment statute embraced executors and administrators—it can not be doubted that the legislature intended to embrace executors and administrators, foreign and domestic, when it deliberately changed the wording of the attachment statute so as to use the same word "defendant," which had been construed by the highest Court of the State to embrace them.

This conclusion is strengthened by the fact that the adjoining States of Ohio and Indiana, and the neighboring State,

Alabama, all had statutes, at the time of the above enactment, authorizing attachments against foreign executors and administrators.

Thus, in Mitchell's Lessee, &c., v., Eyster, 7 Ohio State, 257, an attachment against a foreign administration was sustained under the Ohio statute, providing, "in case of the debtor residing out of the State, the right of attachment, as above provided, may issue against his heirs, executors or administrators."

In Lewis v. Reed, 11 Ind. 242, it was held that under the Indiana statute (2 R. S. p. 66, section 167) "a foreign administrator is liable to be proceeded against by attachment."

And in Bank of Mobile v. McDonald, 22 Ala. 476, it was held that a foreign executor could be sued in Alabama and the estate of the decedent in Alabama be attached. The statute there provided: "And in case of the death of any debtor residing out of the limits of this State, having lands or other property herein, the creditor resident within the State shall in like manner be entitled to recover by attachment against the executors and administrators."

This conclusion is further strengthened by an examination of the other provisions of the Kentucky Statutes relative to foreign executors and administrators. They show the persistent intention of the legislature to protect home creditors and to prevent their being driven to a foreign jurisdiction to assert their claims. Thus, sections 3878 and 3879 provide that a non-resident executor or administrator of a non-resident decedent "may prosecute actions for the recovery of debts due to such decedent" on *condition*, however, that he executes bond with good surety, resident of the county in which the action is brought "conditioned to pay any debt due by his decedent to any resident of this State to the extent assets shall come to his hands."

This section, therefore, secures a preference in favor of Kentucky creditors, where no administration is taken out there,

and the foreign executor or administrator comes there to collect debts by suit.

Sections 3898 to 3900 relate to the case where a personal representative has been appointed in Kentucky to administer the estate of a non-resident. Sections 3898 and 3899 each provide for the "payment of his (decedent's) debts to citizens of this Commonwealth," as the first disposition to be made of the assets collected in Kentucky. If there is a balance after paying the debts owing the citizens of this Commonwealth, that balance, then, is to be distributed according to his last will, or, if no will, according to the law of the State of which he was an inhabitant, or it may be transmitted to the personal representative at the decedent's domicil.

Section 3900 provides:

> "If such person's estate found in this Commonwealth shall be insufficient to pay the creditors here it shall be disposed of without preference, *pro rata*, among the creditors here and such of those elsewhere as prove and demand their debts here within two years after the appointment of a personal representative here. But there must be deducted from such foreign debts the amount received, or which can be received, by the foreign creditor from assets and estate not in this Commonwealth; and if the foreign assets and estate be sufficient to pay all the foreign debts, then no part of them shall be allowed or paid here."

It is seen from these statutes and from the decisions quoted above that the policy of the State of Kentucky is to protect its own citizens and to give them a remedy in its own jurisdiction, to collect their claims against non-residents, whether dead or alive.

Appellees rely upon various decisions holding that a foreign administrator can not be sued. None of these were attachment cases. But, if it were conceded that the Kentucky Code, quoted above, does not, in ordinary cases, authorize a suit against a foreign administrator and an attachment of Kentucky assets, yet, it would not follow that it does not authorize

such suit and attachment against a foreign executor. For the title to such Kentucky assets would not be in the foreign administrator; while, on the other hand, the title to such Kentucky assets would be in the foreign executor.

This distinction, between an administrator and an executor, is clearly shown by the decisions of this Court. It is there shown that an executor derives his title from the *will*, while the administrator derives his title solely from the *government* which appoints him; that the executor derives title from the will, to the *whole* personal estate, *wherever it may be*, at the instant of the testator's death; while the administrator derives title only from the time of his appointment, and *only* to the personal estate *within the territorial jurisdiction appointing him.*

Thus in Dixon's Executors v. Ramsay's Executors, 3 Cranch. 319, in which it was held that an executor could not *sue* in a foreign jurisdiction, this difference between an executor and an administrator was shown. Chief Justice Marshall, delivering the opinion, said:

> "The question in the case is, whether the executor of a person who dies in a foreign country can maintain an action in this, by virtue of letters testamentary granted to him in his own country.
>
> "It is contended that this case differs from that of an administrator, which was formerly decided in this Court, because an administrator derives his power over the estate of his intestate from the grant of the administration; but an executor derives it from the will of his testator, which has invested him with his whole personal estate, wherever it may be.
>
> "This distinction does certainly exist, but the consequences deduced from it do not seem to follow."

The Court then holds that the executor sues, not by power from the will, but by virtue of his letters testamentary, and concludes: "No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country."

This case was followed by the Kentucky Court of Appeals in Moore v. Tanner's Administrator, 5 Mon. 46, where the Court said:

> "And the same Court, in the case of Dixon's executors against Ramsey's executors, decided that an executor can not maintain a suit in the District of Columbia upon letters testamentary granted in a foreign country: 3 Cranch. 319. After adverting to the distinction, which appears to have been taken in argument in that case between an executor and an administrator, Chief Justice Marshall, by whom the opinion of the Court was delivered, remarks: 'This distinction does certainly exist, but the consequence deduced from it does not follow. If an executor derived from the will of his testator a power to maintain a suit, and obtain a judgment for a debt due to his testator, it would seem reasonable that he should exercise that power whenever the authority of the will was acknowledged; but, if he maintains the suit by virtue of his letters testamentary, he can only sue in courts to which the power of those letters extends. It is not, and can not, be denied that he sues by virtue of his letters testamentary, and, consequently, in this particular, he comes within the principle which was decided by this Court in the case of an administrator.'
>
> "Now, if it be true—and that it is, we entertain no doubt—that an executor sues by virtue of his letters testamentary, and that those letters must be obtained from the courts of the country where suit is brought, it follows that the County Court of Caldwell, where the judgment was recovered by Tanner in his lifetime, had jurisdiction to grant probate of his will."

Again, in Stacey v. Thrasher, 6 How. 44, it was held that a judgment obtained in the State of Mississippi against an *administrator* appointed there, is not even *prima facie* evidence against the administrator of the *same decedent* appointed in Louisiana; while in Hill v. Tucker, Executor, 13 How. 458, it was held that a judgment recovered against an *executor* qualified in Virginia *was* evidence against *another executor* of the same decedent, qualified in Louisiana. These two decisions were based upon the ground that there is no privity between administrators of the same decedent appointed by

different States, but that there is privity between executors of the same decedent appointed by different States.

In Stacey v. Thrasher, this Court said :

> "The administrator receives his authority from the ordinary or other officer of the government where the goods of the intestate are situated. But coming into such possession by succession to the intestate, and encumbered with the duty to pay his debts, he is considered in law as in privity with him, and, therefore, bound or estopped by a judgment against him. Yet his representation of his intestate is a qualified one, and extends not beyond the assets of which the ordinary had jurisdiction. He can not, therefore, do any act to affect assets in another jurisdiction, as his authority can not be more extensive than that of the government from whom he received it."

In Hill v. Tucker, Executor, this Court said :

> "The executor's interest in the testator's estate is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession.
>
> "All of them, 'then,' having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it, and as to the remedies for its recovery, what one may plead to bar a recovery another may plead ; and that which will not bar a recovery against any of them, applies to all of them. Between administrators deriving their commissions to act from different political jurisdictions there is no such privity."

It is clear from these authorities that an administrator takes title solely from the government appointing him, and to assets

only within its jurisdiction. He has no title to or interest in assets in a foreign jurisdiction. An executor, on the other hand, takes title from the will, and to the assets wherever they may be, and has the right to act as to those assets in a foreign jurisdiction, subject only to the restrictions which may be imposed by that foreign jurisdiction as a condition precedent to his acting.

It is clear from the cases above, that an administrator would have no right to sue as such in a foreign government, for he has no title to the assets in such foreign government. It is equally clear that an executor would have no right to sue in such foreign government, although he has title to the personalty there, *until* he first complied with the conditions imposed upon him by that government; for while the title is in him from the will, yet, as said in Dixon's Executor v. Ramsay's Executor, *supra*, "No man can sue in the courts of any country, whatever his rights may be, unless in conformity with the rules prescribed by the laws of that country."

Now, if it be conceded that a suit will not lie under the Kentucky Code against a foreign administrator who is out of the State, to attach property in the State, such concession can be made only upon the ground that such foreign administrator has no title to property in the State, and, therefore, is not a party in interest or a proper party. This reason does not apply to a foreign executor, for, as has been shown by the decisions of this Court, as well as by Davis v. Connelly (Ky.), *supra*, he takes title under the will to property everywhere, subject only to such restrictions as may be imposed by the foreign government. Where, however, a proper case arises against a foreign administrator, appellant insists that the statute does authorize a suit against him with an attachment. For example: Suppose an Indiana administrator should be passing through Kentucky with assets collected in Indiana, on his way to some foreign country for the purpose of defrauding the decedent's creditors, could it be doubted that such Indiana

administrator could be proceeded against by attachment in Kentucky? Suppose another case: That an Indiana administrator had come into Kentucky, and had there collected, without suit, debts due the decedent and was about to depart to Indiana without paying decedent's Kentucky creditors. It could not be doubted that in such case an attachment would lie, under the statute, against the Indiana administrator. In the case at bar the foreign executor has title as such executor to the debt garnisheed; he is a non-resident of the State, and it is alleged that he will collect and withdraw the debt from the jurisdiction of Kentucky, unless the attachment is granted. Why, then, is this not a proper case for the Code provisions to apply? It will not do to contend that because an executor can not sue in a foreign government unless he complies with its statutes, that, therefore, he can not be sued there, for the right to sue and the liability to be sued are not correlative. The very policy which requires the foreign government to impose conditions on his suing there, also requires that its citizens shall have the right to sue him there as to the assets subject to its control, for that policy is for the protection and benefit of its citizens. This is held by various authorities, among them Tunstall, etc., v. Pollard's Administrator, 11 Leigh (Va.) 1, where President Tucker, in a luminous opinion, says:

> "It is admitted, without qualification, that a foreign administrator has no right to sue. And it seems to be supposed, that the exemption from liability to suit is the correlative of this proposition. *By no means*; our courts do not, indeed, recognize the right of a foreign administrator to withdraw the assets from this jurisdiction. It is clear, that as a *matter of right*, the power of the foreign jurisdiction does not extend over the assets which are beyond it, and that, of course, a grant of administration by it can not give a right or title to an administrator over assets beyond the territory of the government which grants it. Moreover, as a matter of policy, and of duty to our own citizens, the withdrawal of the assets should not be permitted to the prejudice of creditors in our own country;

who might thereby be compelled to seek their remedy in the domicil of the foreign executor, and there perhaps meet with obstructions and inequalities in the enforcement of their rights from the peculiarities of the local laws: Story's Conf. of Laws, pp. 421-422. But these considerations have no bearing against the suability of the executor. So far from it, they would demand, that the foreign executor who comes here with the assets should be held liable to the action of creditors for their debts, or of legatees for what is due them.

"If it is the duty of every sovereignty to provide for the security of its own people, it is as much bound to enforce justice in their behalf from an executor who is within its jurisdiction, and has also within it the assets out of which they have a right to payment, as it is to prevent a foreign administrator from recovering and withdrawing the assets which are within its power. It is obvious, therefore, that so far from the power to sue and the liability to be sued being *correlative*, they are rather antagonizing; as the same reasons which forbid the first, very strongly sustain the last."

It would seem that the *right to defend* is the true correlative of the liability of the foreign executor to be sued, and, as the foreign executor is never denied *this right*, he should have no cause to complain when sued in a government *having jurisdiction of the assets*. The case of Moss v. Rowland, &c., 3 Bush, 506, is a distinct authority to the effect that a foreign executor, sued in Kentucky, is not required to execute any bond in order that he may *defend*.

Authorities Relied Upon by the Lower Court.

Coming now to the cases relied upon by the lower Court, in its opinion, we find the first case is that of Vaughn v. Northrup, 15 Pet. 1.

The facts in this case were that an administrator appointed by Kentucky, the State of the domicil of decedent, collected a claim due his decedent from the United States. Suit was brought in the District of Columbia by "appellants' claiming to be the next of kin, and heirs of the intestate, for their distributive

share of the said money, against Northrup as administrator; and the other defendants, who are made parties, are asserted to be claimants, as next of kin and distributees." The suit was dismissed for want of jurisdiction. Judge Story, in delivering the opinion affirming the case, said:

> "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It can not confer, as a matter of right, any authority to collect assets of the deceased in any other State; whatever operation is allowed to it, beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he received under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other States have no right to interfere with or to control the application of those assets, according to the *lex loci*."

The assets referred to here, "which the tribunals of other States have no right to interfere with or to control," are evidently meant assets *within the jurisdiction of the appointing government* and *not* assets within the jurisdiction of other States. This is conclusively shown from a further examination of the Opinion.

The Opinion proceeds:

> "*Hence*, it has become an established doctrine that an administrator, appointed in one State, can not, in his official capacity, sue for any debts due to his intestate in the courts of another State; and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceeding numerous, both in England and America. . . . But it has been suggested that the present case is distinguishable, because the assets sought to be distributed were not collected in Ken-

> tucky, but were received as a debt due from the government at the Treasury Department at Washington, and so constituted local assets within this District."

The Court then decides that debts due from the Government of the United States have no locality at the seat of government, and that these were not local assets in the District of Columbia, but Kentucky assets. This shows, conclusively, that all that this case decided was, that a Kentucky administrator could not be sued in the District of Columbia, and made to account there for Kentucky assets. It does not decide that such an administrator could not be sued in the District of Columbia for local assets within that jurisdiction, which the Kentucky administrator had collected there.

The next case relied upon by the lower Court is that of Marrett v. Babb's Exr., 91 Ky. 89. There a foreign executor had contracted to sell land in Kentucky, under an implied power given him by the will to sell this land for the payment of debts. He brought suit for specific performance of the contract against the purchaser. The court decides first, that this foreign executor qualified in Massachusetts, but not qualified in Kentucky, *had power to make the sale*, for *this* power was *derived from the will.* And second, that this foreign executor had *no right* to institute this suit for specific performance, because he had not qualified in Kentucky, the *right to sue being derived from the letters testamentary.* The Court, after quoting the provisions of the statutes applicable, says:

> "Thus we see that a non-resident executor can not even sue to collect a debt of the testator, unless he first complies with this statutory provision, the conditions upon which he is allowed to do so being, as the law originally enacted plainly shows, *intended for the protection of residents of this State.* His qualification as executor in a sister State does not authorize him to administer the assets here, or act otherwise in our courts as such representative. (Citing cases.) He must take out letters testamentary from the proper court in this State, or comply with the provisions of the statute *supra*, if merely the collection of a debt due the decedent is sought."

If, then, the foreign executor was denied the right to enforce by suit a valid contract made by him until he qualified in Kentucky and if the denial of this right to sue was for the *reason* that the policy of that law was "intended for the protection of residents of this State," then it would seem that the *same reason* would demand that a resident of this State should be allowed to sue a foreign executor who has not qualified, but who is about to withdraw the assets from this State to the detriment of resident creditors.

It is clear that the restrictions imposed by the Legislature of Kentucky for the benefit of its own citizens upon the right of the foreign executor to sue there, have no application to his suability there.

The next case is that of Maysville St. R. R. & T. Co. v. Marvin, 59 Fed. Rep. 91. It holds that a foreign administrator could not sue at all in Kentucky to recover an asset of the estate which did not constitute a debt due the decedent. This is another case where a foreign administrator attempted to sue in Kentucky, and was not allowed to do so because of the policy of the State in protecting home creditors. The Court there said:

> "The policy underlying the rule which refuses recognition of letters of administration in a State other than that in which they were granted is founded upon the inconvenience of allowing assets to be taken from one State into another, until domestic creditors are satisfied. . . . The act relating to suits by foreign administrators carefully guards and protects the rights of domestic creditors. Is it to be presumed that, by the use of the general designation 'personal representative,' the legislature intended to so radically change the whole policy of the State as to permit this class of claims to be prosecuted by foreign administrators, without any protection to domestic creditors? What authority is there to require a bond conditioned as required by section 44 of chapter 39? We know of none. . . . Why should it be assumed that the legislative intention was that this asset might be recovered by a foreign administrator, and the recovery removed to the State of administration? With reference

to other assets—such as debts due to the decedent—a very different policy was enforced, and domestic creditors fully protected against the effect of recognizing foreign appointments. Why such a discrimination?"

It is thus seen that the chief argument against construing the statute as allowing a foreign administrator to recover, was that there was no provision made for the protection of home creditors; and, therefore, the Court concluded that the legislature did not intend that this particular asset, any more than any other asset, should be removed from the State of Kentucky, because no provision had been made in the statute for giving bond, and thus protecting Kentucky creditors.

The case of L. & N. R. R. Co. v. Brantley's Admr., 96 Ky. 300, decides the same question.

The last case relied upon by the lower Court is that of Smith v. Baker, 3 Met. 264. This case does decide that as a general rule, a foreign administrator can not be sued in Kentucky, and that in this particular case, there is nothing to bring it within the exceptions to this rule. The facts and decision in this case, as disclosed by the opinion, were that "the debtor died in another State, the administrator having been appointed and qualified there, and being a resident of such State, no action can be maintained against such foreign administrator in the courts of this State, by a creditor of his intestate."

In this case, the administrator had not brought with him to Kentucky any assets from the State of his appointment, nor had he collected or attempted to collect or to interfere with Kentucky assets, nor, in fact, were there any assets in Kentucky, so far as the opinion discloses. In other words, it was a plain suit to recover a personal judgment against a foreign administrator, and not a suit to subject by attachment any particular assets. This case does recognize as "well settled doctrine" that "an administrator or executor, who is appointed, or who qualifies in another State, and there receives assets into his hands, may be sued in the tribunals in this State

by the person or persons entitled to such assets, if he shall have removed to and settled in this State."

This case is not an authority, therefore, that a foreign executor who derives title to assets within the jurisdiction of Kentucky, *from the will*, can not be sued in Kentucky to subject those assets. Any *dictum* which may be found in the above case as to a foreign executor, is overruled by the recent case of Keiningham v. Keiningham's Executor, decided by the Kentucky Court of Appeals in 1903, after the first opinion in the case at bar had been delivered by the lower Court, and is reported in 71 S. W. R. 497 and 24 Ky. Law Rep. 1330. In that case it is held that a foreign executor can be sued in Kentucky. The opinion was delivered by Chief Justice Burnam, who states the facts as follows:

> "This action was instituted by the appellant, Jennie Moss Keiningham, against the appellee, H. F. Finley, as executor of her father, James L. Keiningham, to recover a legacy devised to her by her father's will. The father of appellant died domiciled in the District of Columbia, and his will was probated in the proper court of the District, and appellee duly qualified as executor thereof, and took possession of the devised estate. . . .
>
> "It is the contention of appellee that this judgment should be affirmed for two reasons: First, because he was appointed and qualified as executor and received the assets in the District of Columbia, the domicile of testator at the time of his death; and that for this reason he can only be required to answer for the faithful discharge of his duties in the tribunals of the District of Columbia."

It is thus seen, (1) that this action was against a foreign executor, *as such;* (2) that this executor was appointed and qualified in the District of Columbia where his testator was domiciled; (3) that this executor received the assets in the District of Columbia; (4) that he objected to being sued in Kentucky. The question was, therefore, squarely presented for decision in this case. The court proceeds:

"Appellee has cited numerous authorities of great weight to support the contention that an executor can not be sued outside the jurisdiction of his appointment for a failure to carry out the trust imposed upon him, but in the early case of Dorsey's Ex'or v. Dorsey's Adm'r, 28 Ky. 280, it was held by this Court, in an opinion by Judge Underwood, that the distributee of a decedent might enforce distribution in the courts of the State of assets received by an administrator appointed in Maryland if found in this State. This case was followed by that of Atcherson's Heirs v. Lindsey, 45 Ky. 86, in which the administrator and infant heirs of John Atcherson sought to recover of James Lindsey, who administered upon the estate of decedent in South Carolina, certain assets received by him in that State. And the contention was made in that case that as Lindsey was appointed administrator in South Carolina and received the assets sued for there, he could not be held responsible in the tribunals of this State for the surplus remaining in his hands at the suit of a local administrator and infant heirs of decedent. In response to this contention the court, through Judge Marshall, after referring to the case of Dorsey's Ex'or v. Dorsey's Adm'r, quoted *supra*, said: 'Upon the express authority of this case, and under our own sense of what is required by convenience and justice, and of the comity due to the sovereignty and laws of South Carolina, we are of the opinion that the mere fact that Lindsey was appointed administrator in that State, and received there the assets for which he is now charged, does not of itself exempt him from all liability to be sued in the tribunals of this State for a claim growing out of his having thus received the assets, or the proceeds, of which the complainant, or some of them, are entitled. Whether any decree should finally be rendered against him on this account may depend upon the facts disclosed in his answer and upon the proof, but we think he was bound to answer.'

"The question was again before this court, in Manion's Admr. v. Titsworth, 57 Ky. 597, and in a well-considered opinion by Judge Simpson it was decided that it was settled doctrine in this State 'that the administrator or executor, who is appointed or who qualifies in another State, and there receives assets in his hands, may be sued in the

tribunals of this State by the persons entitled to such assets, if he shall have removed to and settled in this State.'

"It follows from these decisions that appellant was entitled to maintain this suit against the appellee to recover the balance found due in his hands after the payment of the debts of the decedent in the courts of this State, if shown entitled thereto."

This case settles, as to Kentucky, that a foreign executor can be sued, even without the attachment statutes. Then if he can be sued, he is necessarily capable of being a "defendant;" and if a "defendant who is . . . a non-resident of the State," the plaintiff may have an attachment.

In conclusion, it has been shown that under the provisions of the Kentucky Constitution and Statutes, the debt owing from the foreign corporation in the case at bar was subject to attachment.

It has been further shown that prior to the adoption of the first Code of Practice, and when the administration statutes were substantially the same as those in force to-day, the Kentucky Court of Appeals had decided that the estate of a decedent could be attached; that the only way to prevent the preference created by the attachment was to bring a settlement suit and enjoin it, that where no personal representative had qualified, the non-resident heirs, distributees or legatees could be made defendants in his stead, and the estate be attached; that a foreign executor or administrator could be sued, and that the word "defendant" in an attachment statute was intended to and did include executors and administrators. It has been further shown that all of these decisions were rendered within a period ranging from five to ten years before the adoption of the first Code of Practice, and that the adjoining States, Ohio and Indiana, and the neighboring State, Alabama, all had statutes held by their highest courts to authorize attachments against foreign executors and administrators. It was then that the Kentucky Legislature changed the language of the attachment statute which applied to non-residents, using in the Code the same word which had been held to em-

brace executors and administrators. It has been further shown that the policy of the State of Kentucky, gathered both from its legislative enactments and the decisions of its courts, is and has been to protect its own citizens as to assets within its control, and that this policy opposes their being driven to a foreign jurisdiction to enforce their demands.

It has been further shown that the executor derives title from the will to the personal estate, wherever it may be. That his right to sue and his liability to be sued in a foreign jurisdiction are not correlative, and that the same policy of Kentucky—that of protecting its own citizens as to assets within its control—which forbids his suing, requires that he be sued to prevent the withdrawal of the assets.

In the case at bar, it is alleged in the petition and confessed by the demurrer that the assets attached here are the proceeds of Kentucky real estate, and that exclusive of these assets, there are assets in the hands of the executor in Wisconsin, "more than sufficient in value to pay all of the debts of said estate, owing to the creditors of said Merritt B. Atwater outside of the State of Kentucky." This, then, like the case of Atchison's Heirs v. Lindsey, *supra*, is a suit to subject the surplus, and no injustice could be done to the Wisconsin creditors, should it be sustained; nor could any preference be created as against Kentucky creditors, for it is alleged in the petition and confessed by the demurrer that there are no Kentucky creditors other than plaintiff.

The Circuit Court was of opinion (R. 17) that appellant could obtain administration upon the decedent's estate in Kentucky, and in that way reach the assets, and for this reason the suit at bar could not be maintained. This is contrary to the decision in Hefferman v. Forward, 6 B. M., *supra*, where it was held that the creditor was not bound to provoke an administration, but could, under the statutes, attach the decedent's estate, making the non-resident widow and heirs defendants in place of the personal representative. The Court

there said that it did not regard the taking out of letters of administration "*as an ordinary legal remedy*, which should preclude the interference of the Chancellor, in behalf of the creditor, *under the statutes referred to.*" . . . "Besides the personalty might, in the meantime, be sent out of the State to the non-resident heirs, or the debt paid over to them or to some foreign administrator, and the fund, which should be made liable to the creditors here, escape from the power and jurisdiction of the Chancellor."

It is alleged in the petition and confessed by the demurrer that "unless an attachment is granted plaintiff herein, and said assets attached and subjected by the court to plaintiff's claim herein, they will be collected by said executor and withdrawn from the jurisdiction of this State and distributed in a foreign jurisdiction and plaintiff will be without remedy." It is thus seen that the event which *might* happen and, therefore, justified the attachment in Hefferman v. Forward, *will* happen in the case at bar, unless the attachment is sustained.

As has been seen, an executor can not sue in a foreign government for the technical reason that his power to sue is derived—not from the will—but from his letters testamentary, which have no extra-territorial effect. The practical reason for denying their extra-territorial effect, and thus denying the right to sue, is the policy of the government to protect its own citizens by preventing a foreign executor from withdrawing assets within its control, until he has complied with the rules prescribed by such government for carrying out that policy of protection. But neither the techical reason nor the practical reason applies to the suability of such executor in a foreign government as to assets subject to its jurisdiction, for the executor derives title to the assets *everywhere*, not from his letters testamentary, but from the will, the letters testamentary being merely *evidence* of his right to act; and where it is alleged, as in the case at bar, that he *will act*, and where it is admitted by the demurrer that he *will act* as

to assets within the control of Kentucky, and will withdraw those assets from the control of Kentucky, and distribute them in a foreign jurisdiction, then, certainly, there can be no technical nor practical reason why he should not be sued in Kentucky as to such assets. He admits that he is executor, that the title is in him, and that he will withdraw those assets from the control of Kentucky jurisdiction. He has also the unquestioned right to defend, and has exercised that right in this case by demurring to the petition on a number of different grounds.

Appellant insists that the statutes of Kentucky authorized this suit, and that it was error to dismiss it for want of jurisdiction.

Respectfully submitted,

ALEX POPE HUMPHREY,

WILLIAM BULLITT DIXON.

Counsel for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1903.

M. H. COURTNEY, *Appellant*,
v.
LOUIS A. PRADT, Executor of MERRIT B. ATWATER, deceased, and WM. C. ATWATER.
No. 371.

Motion of Appellees to Advance and Dismiss the Appeal and Brief Thereon.

Motion to Advance and Dismiss.

Now come the appellees, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and Wm. C. Atwater, and move the honorable Court to advance this case under Rule 32 of the Court and to dismiss the appeal herein, being an appeal from a decree of the U. S. Circuit Court for the Western District of Kentucky, because the Court has no jurisdiction of the same:

First. Because the appeal herein does not involve the jurisdiction of said Circuit Court as a Federal tribunal, as contemplated by the Judiciary Act of March 3d, 1891, section 5.

Second. Because the decree of said Circuit Court, appealed from dismissing appellant's case, was not based on a denial of the jurisdiction of that Court as a Federal Court, but, in the exercise of that jurisdiction; and the case was dismissed for the reason that a suit can not be

maintained in the courts of Kentucky against a foreign executor.

Third. Because the power of the Circuit Court, as a Federal Court, to hear and finally determine all questions and issues involved in this case has not, in any way, been denied, controverted or put in issue.

Fourth. Because no question of jurisdiction has been certified by the Circuit Court to this Court for decision, as required by the said Judiciary Act of March 3d, 1891, section 5; and no application was made to said Circuit Court for such certificate.

Fifth. Because no ground of jurisdiction of this Court upon this appeal is shown in the record herein.

The foregoing motion is based upon the following facts:

On the 25th day of September, 1901, appellant, M. H. Courtney, filed a petition in equity in the Powell Circuit Court, Kentucky, against the above-named appellees. By said petition he stated, in substance, that, in 1890 and prior thereto, Merrit B. and Wm. C. Atwater were partners under the firm name of M. B. Atwater & Company; that plaintiff, prior to the 10th of December, 1890, had rendered valuable services for said partnership, and there was a difference between plaintiff and said partners as to the amount plaintiff was entitled to receive for said services; that said partners, in order to adjust the said difference, proposed, by letter of December 10, 1890, to give to plaintiff, in satisfaction of his claim, stock in the Atwater and Fair Lumber Company, a Wisconsin corporation, of the face value of $5,000, with a guarantee that it was worth $8,000, and that said firm would, at the end of that season's cut, pay plaintiff $8,000 in cash therefor; that plaintiff accepted said proposition, by letter, and, at the end of the season's cut, demanded of said partners

a fulfilment of their offer; but his demand was not complied with, and that said partners wholly failed and refused to transfer to plaintiff said stock or pay him said sum of $8,000, or any part therof; that in the year 1898, the said Merrit B. Atwater, then a citizen of Wisconsin, died testate, and appointed the said Louis A. Pradt his executor; that said will was duly probated by the County Court of Marathon County, in the State of Wisconsin, and that said Louis A. Pradt had duly qualified as such executor and is now acting as such. The petition further stated that said Merrit B. Atwater, by his will, devised to his daughter, Charlotte R. Pradt, his residence in the City of Wausau, Wis.; to Sarah Downs, $1,000; to defendant Wm. C. Atwater, all of his right, title and interest in and to The Seamless Structural Company, of Milwaukee, Wis.; and the residue of his estate—real, personal and mixed—to his wife, Charlotte Atwater, for and during her natural life, and, after her death, he bequeathed and devised to said Wm. C. Atwater an undivided one-sixth interest in said residue. The petition further stated:

> "That the Atwater and Allen Land & Lumber Company (a different corporation from the Atwater and Fair Lumber Company, above mentioned, also a Wisconsin corporation) is a corporation duly created by and organized under the laws of the State of Wisconsin, with power to buy, sell, own and hold real estate in the State of Kentucky, and that prior to August, 1901, said corporation did buy and own real estate in the State of Kentucky, and practically all of its assets consisted of real estate in the said State of Kentucky. Plaintiff states that, during the month of August, 1901, said corporation sold its said real estate and realized a large sum of money therefor, and that practically the only business ever done by said corporation was to buy, own, hold and sell said real estate in the State of Kentucky.
>
> "Plaintiff states that Merrit B. Atwater, at the

time of his death, owned stock in said corporation, and plaintiff states that said corporation now owes to the defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, a large sum of money as such executor. That the chief office and place of business of said corporation in the State of Kentucky is in Clay City, Powell County, Kentucky, and that said corporation has an agent resident there, upon whom a summons can be served." (Printed Record, page 3.)

The allegation, just quoted, was made for the purpose of procuring and was followed by an attempt to state grounds for a general order of attachment against the property belonging to the estate of Merritt B. Atwater located in Kentucky, and, a further statement followed, that plaintiff knew of no other creditors of the said Merritt B. Atwater, deceased, and that the assets of the estate of the said Merritt B. Atwater, in Wisconsin, exclusive of the stock held by him in the Atwater and Allen Land & Lumber Company was more than sufficient, in value, to pay all of the debts of said estate owing to creditors outside of the State of Kentucky.

Appended to said petition was the following prayer:

"Wherefore, plaintiff prays for judgment against the defendant, Louis A. Pradt, executor of Merritt B. Atwater, deceased, and William C. Atwater, and each of them, for the sum of $8,000, with interest thereon at the rate of six per cent. per annum, from the 1st day of November, 1891, until paid, and for his costs herein, and prays for a general attachment against the property of said defendants, including debts owing to them, or either of them, and any choses in action, stocks, legal or equitable interests they may have in stocks or other property, and, that the same, when attached, may be subjected and applied to the satisfaction of plaintiff's claim herein, and further prays for all (general), equitable and proper relief." (Pages 1 to 4.)

At the filing of said petition, a general order of attachment was procured and directed to and placed in the hands of the sheriff of Powell County to execute. The only execution thereof the sheriff attempted to make was to summon the Atwater and Allen Land & Lumber Company (said last above-named Wisconsin Corporation), to answer as a garnishee, by

> "Delivering to Edward Rhubusky, the duly appointed agent of said Atwater and Allen Land & Lumber Company, a copy of the within attachment and summoning said Atwater and Allen Land & Lumber Company to answer as garnishee this September 25th, 1901." (Page 7).

Edward Rhubusky, named in the above return of the sheriff, had been designated by the Atwater and Allen Land & Lumber Company as its agent upon whom process could be executed, as required by Sec. 571, Ky. Stat., that Company having theretofore transacted business in the State of Kentucky. There was no claim that either of the defendants resided in or had any property in the State of Kentucky capable of manual delivery, nor that said Atwater and Allen Land & Lumber Company was, in any way, indebted to said William C. Atwater. Copy of said order of attachment, with the object of the action endorsed thereon, can be found on pages 6 and 7 of the Record; the said endorsement on the order was made in pursuance of Subsection 3 of Section 203 of Kentucky Civil Code, which fixes the manner in which a garnishee may be summoned,

> "by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or, as to a debt or demand, to the person owing it (d); or, as to stock in a corporation, or property held, or a debt or demand owing, by it, to the officer or agent upon whom a summons may be

served according to the provisions of Sec. 51, and by summoning the person or corporation to answer as a garnishee in the action."

On the 19th day of March, 1902, the said Atwater and Allen Land & Lumber Company filed in said State Court its answer as garnishee, which answer can be found on pages 7 and 8 of the Record, and is as follows:

"The Atwater and Allen Land & Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin, summoned herein as garnishee, says that said M. B. Atwater in his lifetime owned two hundred and fifty shares of the capital stock of said Company of the par value of $45.00 per share, and, owned said two hundred and fifty shares at the time of his death and that said shares now stand on the book of said Company in the name of said M. B. Atwater and now held by L. A. Pradt, who is the executor of the estate of the said M. B. Atwater.

"That, on the 30th day of August, A. D. 1901, a dividend was declared by the directors of said Company at a meeting held on that date.

"That the indebtedness of said Pradt, as executor of said M. B. Atwater, deceased, on account of said dividend, is $4,757.37, and that said amount is being held by the Atwater and Allen Land & Lumber Company, awaiting the decision of this Court.

"Said Atwater and Allen Land & Lumber Company does not owe anything to said W. C. Atwater, who is not a stockholder in said Company.

"That said W. C. Atwater has not been a stockholder in said Company since the year 1893 and was not a stockholder at the time of the declaration of said division on the 30th day of August, A. D. 1901."

After said answer was filed; to wit, on the 21st day of March, 1902, the said defendants filed in said State Court their petition for removal to the Circuit Court of the

United States for the Eastern District of Kentucky, which can be found on page 8 of the Record, and, is as follows:

"Your petitioners, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and Wm. C. Atwater, respectively show to this Honorable Court that they are the defendants in this suit, which is of a civil nature, and, that the matter and amount in dispute in this cause exceeds the sum and value of two thousand dollars ($2,000) exclusive of interest and costs, and that the controversy herein is wholly between citizens of different States; that the plaintiff, M. H. Courtney, was, at the time of the commencement of this suit, and still is, a citizen of the State of Kentucky, residing at Clay City, in said State, and, that your petitioner, Louis A. Pradt, executor of Merrit B. Atwater, deceased, was, at the time of the commencement of this suit, and still is, a citizen of the State of Wisconsin and of no other State, residing in the City of Wausau, in said State, and, your petitioner, Wm. C. Atwater, was, at the time of the commencement of this suit, and still is, a citizen of the State of Illinois and of no other State, residing in the City of Chicago, in said State, and, that your petitioners desire to move this cause, before the trial thereof, into the next Circuit Court of the United States to be held in the Eastern District of Kentucky, and, your petitioners offer herewith good and sufficient surety for their entering in the Circuit Court of the United States for the Eastern District of Kentucky, first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by the said Circuit Court of the United States, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

"And your petitioners therefore pray that the said surety and bond may be accepted. That this suit may be removed to the next Circuit Court of the United States to be held in the Eastern District of Kentucky, pursuant to the statutes of the United States in such cases made and provided, and, that no further pro-

ceedings may be had herein in this Court—and, they will ever pray."

On the filing of said petition, the bond of petitioners, to be executed on the removal of a case, was presented, accepted and approved by the State Court and an order entered that the case be moved for trial to said Circuit Court. (Pages 10 and 11.)

After the record was copied and filed in said Circuit Court, to wit, on September 9, 1902, the following motion was entered in said Court:

> "The defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and Wm. C. Atwater, entering their appearance herein for the purpose of this motion only, move the Court to dismiss this cause for a want of jurisdiction to try same." (Page 13.)

At the same time the said Louis A. Pradt, executor, as aforesaid, filed special demurrer, setting forth as grounds therefor:

> "First. That the Court has no jurisdiction of the the person of this defendant.
>
> "Second. That the Court has no jurisdiction of the subject-matter of this action.
>
> "Third. That the complaint does not state facts sufficient to constitute a cause of action.
>
> "Fourth. That it appears upon the face of the said bill of complaint that this action was not commenced within the time limited by law, to wit, within the time limited by ———.
>
> "Fifth. That the plaintiff is not entitled upon said bill to the relief he prays for, because he has a plain and adequate remedy at law.
>
> "Sixth. That the plaintiff has not in and for his said bill stated such a case as entitled him in a court of equity to any discovery from this defendant, or, to any relief against him as to the matters contained in the said bill of complaint or any of such matters, and, that said bill doth not contain any matter of

equity whereon this Court can ground any decree or give the plaintiff any relief against this defendant." (Page 14.)

At the time the above motion was made and special demurrer filed, the plaintiff moved the Court to remand the case to the State Court, but stated no grounds therefor; his motion is as follows:

"The plaintiff, M. H. Courtney, moves the Court to remand this case to the State Court from whence it removed.

"BRECKINRIDGE & SHELBY &
"W. B. DIXON, *Attorneys for Plaintiff.*" (Page 12.)

Both of said motions and demurrer were submitted. (Page 13.) Afterward the Court filed two opinions thereon. (Pages 15 to 24.) The first of these opinions held that the motion to remand should be *overruled* (page 18), and, both of them held that the motion to dismiss should prevail. On page 15 of the Record the Court's statement of the case can be found; it is as follows:

"This is a suit by a creditor of a partnership, one of whose two members is dead, against his executor and the surviving partner, seeking to obtain payment of his debt. Both of the defendants are non-residents of this State and were so when the suit was brought. The decedent was likewise a non-resident at the time of his death and the defendant executor was appointed and qualified as such in the State of decedent's domicile; to wit, the State of Wisconsin. The suit was brought originally in the Powell Circuit Court and has been moved to this Court by the defendants on the ground of diversity of citizenship. Each defendant was brought before the State Court by constructive service of process and neither entered his appearance to the suit. An attachment was sued out and levied on stock owned by decedent in a Wisconsin corporation, doing business in this State,

and an indebtedness on the part of said corporation to him by serving the writ of attachment upon its agents in this State designated in accordance with the requirement of Sec. 571, Ky. Stat. It was not levied upon any property of the surviving partner, the other defendant. It is, therefore, a suit to subject the stock in and claim against said foreign corporation to the payment of said indebtedness by means of this attachment.

"The defendants move to dismiss the suit because its predecessor, the State court, acquired no jurisdiction by virtue of the proceedings had therein of the subject-matter of the suit or the persons of defendants.

"It is certain that the State Court had no jurisdiction so far as Wm. C. Atwater, the surviving partner, was concerned, unless it had jurisdiction of the suit as against the foreign executor of the deceased partner. It is not alleged that Wm. C. Atwater has any property in this State and the attachment has not been levied upon any property of his, save so far as he may be interested in the property levied on as the property of the deceased partner. The suit should be treated, therefore, as if it were a suit against the foreign executor alone.

"It is claimed by defendants that the State Court acquired no jurisdiction of the suit, so far as said defendant was concerned, upon two grounds. One is, that, by reason of the fact that the garnishee is a foreign corporation, the decedent's stock in and claim against it is not subject to attachment and subjection to payment of plaintiff's indebtedness against the partnership in the courts of the State. * * * The other ground is, that, because the claim garnisheed is a decedent's estate, it was not subject to attachment."

The Court, after making the foregoing statement of the case and some reference to questions submitted, says:

"There is one ground upon which it can be

claimed, without question, the State Court has no jurisdiction of the suit as against the defendant executor, and hence, not at all, and, that ground is that he is a foreign executor. The law in regard to foreign representatives of decedent's estate to sue and be sued in other jurisdictions, than those in which they were appointed, is thus stated by Mr. Justice Story in

Vaughn v. *Northrup*, 15 Pet. 1.

"It has become an established doctrine that an administrator, appointed in one State, can not, in his official capacity, sue for any debts due to his intestate in the courts of another State, and that he is not liable to be sued in that capacity in the courts of the latter by any creditor, for any debt due there by his intestate."

"This law has been recognized and applied in this Commonwealth. Because of it, it has been held that a foreign personal representative could not sue to recover a debt due the decedent without complying with the terms of Sec. 3878 and 3879. Ky. Stat."

Marrett v. *Babb*, 91 Ky. 88.

"And that a foreign personal representative could not sue at all in this State to recover an asset of the State which did not constitute a debt due the decedent.

Maysville St. R. R. & T. Co. v. *Marvin*, 59 Fed. Rep. 91;

L. & N. R. R. Co. v. *Brantley*, 96 Ky. 297.

"That a suit can not be brought in this State against a foreign personal representative is expressly decided in the case of

Smith v. *Baker*, 3 Met. 264.

"It is true this suit is against him to subject an asset claimed to have a situs in this State. But that can make no difference. The resident creditors of a non-resident have ample provisions made for subjecting assets having a situs in the State to the payment of their debts. They can obtain administration on the decedent's estate in this State and then those assets. And the foreign personal representative can

not sue at all for some, and, for those for which he can sue he is required to give bond that will protect local creditors. It is, therefore, not necessary, in order to protect them, that such a novel proceeding as a suit against the foreign personal representative should be upheld. I am not aware of any authority justifying such a proceeding.

"It seems to me, therefore, that the motion to dismiss the suit because of want of jurisdiction in the State Court to entertain the suit should be sustained. There is no doubt that, if such want of jurisdiction exists, this Court has the power to dismiss the suit. I am not bound to remand the case and let the State court determine the question. By reason of the diversity of citizenship and compliance with the removal status this Court has acquired the right to determine that question and to act accordingly." (Pages 16 and 17.)

In the second opinion, the Court, after stating the authorities, said:

"This being so, there is no room for holding that this suit is maintainable against the defendant executor. There is no statute in this State rendering a foreign executor or administrator suable therein. Sections 3878 and 3879, Ky. Stat., provide for his suing herein, upon taking certain steps. If he takes such steps he can not only sue therein, but is liable to be sued therein, even by a non-resident creditor, as was held in New York in the case of

Hopper v. *Hopper*, *supra*.

"Sections 3898, 3899 and 3900, Ky. Stat., provide for administration upon the assets of a non-resident decedent located in this State. By either procedure creditors of a non-resident decedent subject assets located in this State to the payment of their debts. This procedure is ample to secure them in their debts. But, whether so or not, there is none other. The Legislature of Kentucky has not seen fit to provide that suits may be brought against foreign execu-

tors or administrators and attachments obtained against the estates of their decedents located in this State, as has been done in the States of Kansas, Ohio, Alabama, Indiana, and perhaps in other States. In the absence of such a statute no such suit can be brought in this State. And, I think the case of

Smith v. *Baker*, 3 Met. 264,

cited in former opinion, is directly in point here. The facts of the case are merely stated in the opinion. But, it cites the extract from Story, quoted above, in support of the decision there made and the reasonable inference is that it was a suit against a foreign representative to subject assets in this State or to render him liable on account of assets therein. And, whether so or not, it expressly lays down the only condition upon which a foreign representative can be sued in this State and does not come within that requirement.

"Judge Duvall said:

"'An administrator or executor who is appointed, who qualifies in another State and there receives assets into his hands, may be sued in the tribunals in this State by the person or persons entitled to such assets *if he shall have removed to and settled in this State.* Such seems to be the well settled doctrine. But, the right to sue a foreign administrator has never been extended further.'

"If, then, it be conceded that the liability of the non-resident corporation doing business in this State to the decedent Atwater is an asset located in this State and that it is allowable for a creditor of decedent to sue out an attachment against his property in a suit against his personal representative, the latter of which two conditions, at least, I very seriously doubt, still, this suit can not be maintained because it is a suit against a foreign executor who has never collected said asset and has never qualified with Sections 3878 and 3879, Ky. Stat., so as to be authorized to sue for it and there is no statute in this State authorizing such a suit. I must, therefore, adhere to my former opinion." (Pages 23 and 24.)

Thereupon, a decree was entered overruling the plaintiff's motion to remand and sustaining defendant's motion to dismiss the case for want of jurisdiction, and, noting the fact that, on the entering of said decree, plaintiff had *filed a petition* for appeal and an assignment of errors, and, that his appeal was allowed, as prayed for, which decree is as follows:

> "This cause having been heard and submitted on the plaintiff's motion to remand this case to the State Court, and, on the defendant's demurrer to the jurisdiction of this Court, and, the motion of defendants to dismiss this case for want of jurisdiction in this Court, and, the Court being fully advised, it is ordered that plaintiff's motion to remand this case to the State Court be and it is hereby overruled, to which plaintiff excepts.
>
> "It is further ordered, adjudged and decreed that defendant's demurrer to the jurisdiction of this Court and motion to dismiss this suit for want of jurisdiction in this Court, be and the same are hereby sustained, and, that this suit be and the same is hereby dismissed, for want of jurisdiction in this Court. And, thereupon came plaintiff in open court and filed his petition for an appeal and assignment of errors, and, prayed an appeal to the Supreme Court of the United States from his final decree in dismissing said suit for want of jurisdiction in this Court, which appeal is hereby allowed upon the execution of a bond in penalty of $500 by plaintiff M. H. Courtney, with good and sufficient security that appellant shall prosecute his appeal to effect, and, answer all damages and costs, if he fail to make his plea good, which bond shall operate as a supersedeas." (Page 25.)

His assignment of errors is as follows:

"I.

"The Court erred in overruling and in not sustaining plaintiff's motion to remand this cause to the State court.

"II.

"The Court erred in sustaining and in not overruling defendant's demurrer in the jurisdiction of this court.

"III.

"The Court erred in sustaining and in not overruling the defendant's motion to dismiss this suit for want of jurisdiction in this Court.

"IV.

"The Court erred in dismissing this suit for want of jurisdiction in this Court.

"Wherefore, the petitioner says that the said final decree, order and judgment aforesaid is erroneous, and, prays this Honorable Court to grant him an appeal to the Supreme Court of the United States to the end, that said decree may be reversed and that said errors may be corrected, and so he will ever pray." (Page 26.)

No question as to the jurisdiction of the Circuit Court was certified to this court by the Circuit Court for decision, and, no application was made to the Circuit Court for such certificate.

The appellant has had the entire record printed.

EDWIN C. BRANDENBURG,
Attorney for Appellees.

Brief of Appellees on Motion to Dismiss This Appeal for Want of Jurisdiction to Entertain the Same.

This is an appeal from the decree of the United States Circuit Court for the eastern district of Kentucky, dismissing the action. The appeal is taken by the complainant. The defendants and appellees have made a motion to dismiss this appeal. The statement of facts in the motion papers gives every step taken in the case, from the time of its commencement up to the time it was dismissed, together with the assignment of errors and the allowance of the appeal. From this it will be seen that the suit was originally commenced in the Powell County Circuit Court in the State of Kentucky. The plaintiff at the time of commencement of the suit was and still is a resident and citizen of Kentucky. The defendants were then and are now non-residents and citizens of other States. The amount in controversy exceeds $2,000.

Defendants and appellees filed a petition in the State court for a removal of the case to the United States Circuit Court for the eastern district of Kentucky, the motion being based solely on the ground of diverse citizenship. The cause was accordingly removed to the United States Circuit Court. After such removal, plaintiff and appellant filed a motion to remand the cause to the State court without any specific allegations or grounds for such removal. This motion was overruled. The defendants and appellees then filed in the United States Circuit Court a special demurrer to the jurisdiction of the court, and also entered a motion to dismiss the action because of such lack of jurisdiction. The grounds of the motion were that the defendant, being a non-resident executor appointed by a court of general probate jurisdiction in Wisconsin, could not be sued in Kentucky.

The demurrer was sustained and also the defendant's motion to dismiss, and the action was accordingly dismissed. Such dismissal was not made because of lack of jurisdiction in the United States Circuit Court as a federal court to hear and determine all issues of law and fact, involved in the action; it was dismissed in the actual exercise of such jurisdiction. The appellant has had the entire record printed. The decree dismissing the case is on page 25 of Record. This decree fails to state the reason of the court for holding that it had no jurisdiction to try the action, but the reasons for such dismissal are plainly stated in each of two opinions filed by the Court. (Pages 15 to 24 of Record.)

In its first opinion (see page 16 of printed transcript) the court said:

> "There is one ground upon which it can be claimed without question, the State Court has no jurisdiction of the suit as against the defendant executor and hence not at all, and that ground is that he is a foreign executor."

In the second opinion (see printed transcript of Record, page 23) the Court said:

> "This being so, there is no room for holding that this suit is maintainable against the defendant executor. There is no statute in this State rendering a foreign executor or administrator suable therein. § 3878 and § 3879 Ky. Stat. provide for his suing herein upon taking certain steps; if he takes such steps he can not only sue therein, but is liable to be sued therein even by a non-resident creditor, as was held in the N. Y. case of *Hopper* v. *Hopper*, *supra*." (125 N. Y. 400.)

Again the Court says (page 24, printed transcript):

> "Still this suit can not be maintained, because it is a suit against a foreign executor, who has never col-

lected said asset and has never complied with § 3878 and § 3879 Ky. Stat., so as to be authorized to sue for it, and there is no statute in this State authorizing a suit."

It is clear therefore that this action was dismissed for the sole reason that the defendant executor was under the laws of Kentucky not liable to suit in that State.

In order to determine the ground for the decision of the lower court its opinion may be examined.

Loeb v. *Trustees of Columbia Township*, 179 U. S. 472;
Sayward v. *Denny*, 158 U. S. 180;
Murdock v. *Memphis*, 20 Wall. 590;
Cross v. *U. S. M. Co.* 108 U. S. 477.

Some of these decisions were made in appeals from State Courts but the rule adopted is applied to all appeals. Sec. 5 of the Act of March 3, 1891, provides that appeals or writs of error may be taken from the U. S. District or Circuit Courts direct to the Supreme Court in cases in which the jurisdiction of the court is in issue, and in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. It must be conceded that this Act of 1891 provides for no direct appeal in this case, except upon the question of jurisdiction.

The U. S. Circuit Court for the Eastern District of Kentucky did not certify to this Court the question of jurisdiction as required by the Judiciary Act cited, and no application was made to said Circuit Court for such certificate.

The grounds of this motion as set forth in the motion are—

"First. Because the appeal herein does not involve the jurisdiction of said Circuit Court as a Federal tribunal, as contemplated by the Judiciary Act of March 3, 1891, section 5.

"Second. Because the decree of said Circuit Court

appealed from, dismissing appellant's case, was not based on a denial of the jurisdiction of that Court as a Federal court, but in the exercise of that jurisdiction; and the case was dismissed for the reason that a suit can not be maintained in the courts of Kentucky against a foreign executor.

"Third. Because the power of the Circuit Court, as a Federal court, to hear and finally determine all questions and issues involved in this case has not, in any way, been denied, controverted or put in issue.

"Fourth. Because no question of jurisdiction has been certified by the Circuit Court to this Court for decision, as required by the said Judiciary Act of March 3d, 1891, section 5; and no application was made to said Circuit Court for such certificate."

This is not a case in which the jurisdiction of the Court is in issue as prescribed by such Judiciary Act. See 26 Stat. L. 826; U. S. Comp. Stat. 549.

In *Maynard* v. *Hecht*, 151 U. S. 324, it was held that such certificate as to the jurisdictional question must be presented in order to give this Court jurisdiction.

In *Huntington* v. *Laidley*, 176 U. S. 668, this Court stated the rule as follows:

"In order to maintain the appellate jurisdiction of this Court under this clause the record must distinctly and unequivocally show that the Court below sends up for consideration the single and distinct question of jurisdiction.

"This may appear in either of two ways: by the terms of the decree appealed from and of the order allowing the appeal or by separate certificate of the Court below."

In *Arkansas* v. *Schlurholz*, 179 U. S. 598, this question was again considered and the doctrine of *Maynard* v. *Hecht*, *supra*, approved. This last cited case holds that the question of jurisdiction can not be ascertained from the

assignment of errors made by appellant. But the absence of this certificate as to a jurisdictional question may not be important in this case, although upon this ground alone the Court might be justified in dismissing the appeal. Independent of this question, however, it appears from the record, including the opinions of the lower Court, that the jurisdiction of the Circuit Court as a Federal court was in no wise involved in the case.

This question of jurisdiction is one which the Court will answer for itself whether propounded by counsel or not.

> *Defiance Water Company* v. *Defiance*, 191 U.S. 184;
> *Anglo-American Provision Co.* v. *Davis Provision Co.* 191 U. S. 376.

In *Smith* v. *McKay*, 161 U. S. 355, the question was whether the plaintiff had a complete remedy at law and the Circuit Court had jurisdiction of the parties by reason of diverse citizenship and of the subject-matter. It was held not to be a question of jurisdiction which could be certified to the Supreme Court under the Judiciary Act of March 3, 1891, section 5, the objection being not to the want of power but to the want of equity. In this last case the Court impliedly at least sustained the proposition that it was only questions of Federal jurisdiction which could be brought directly to this Court on appeal from the Circuit or District courts.

In *Carey* v. *Houston & T. C. R. Co.* 150 U. S. 170, this view is sustained.

In *Louisville Trust Co.* v. *Knott*, 191 U. S. 225, on appeal from the Circuit Court for the western district of Kentucky, the appeal was dismissed for want of jurisdiction.

The question there was whether the Federal circuit court under the principle of equity and comity governing all courts of concurrent jurisdiction over the same

subject-matter has authority to administer a trust estate, after a suit with reference thereto has been begun in the State court. It was held that the case did not involve the jurisdiction of the circuit court as a Federal court and therefore no direct appeal would lie. The Court in this last case said:

> "The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a Federal court and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other."

And in *Blythe* v. *Hinckley*, 173 U. S. 501, the court said:

> "Appeals or writs of error may be taken directly from the circuit court to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as Federal courts. The question alone of jurisdiction being certified to this court. * * * If we were to take jurisdiction on this certificate we could only determine whether the circuit court had jurisdiction as a court of the United States, and as the decree rested on no denial on its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal can not be maintained in that aspect."

Nor can the force of these authorities be diminished by the *dictum* of the Court in cases where this question was not raised. Upon this question the Court, in *Louisville Trust Co.* v. *Knott*, quotes Chief Justice Marshall in U. S. *v.* Moore, 3 Cranch. 159, as follows:

> "No question was made in that case as to the jurisdiction. It passed *sub silentio* and the Court does not consider itself as bound by that case.

In the case of *Louisville Trust Co.* v. *Knott*, this Court announces its final and decisive views upon this question, and as sustaining this view by strong implication we cite the case of *Cummings* v. *Chicago*, 188 U. S. 410, holding that where the jurisdiction of the Federal court, as a Federal court is involved, a direct appeal will lie.

The same may be said of *Davis & Farnum Co.* v. *Los Angeles*, 189 U. S. 207.

The Court in that case said that as the bill was based upon diversity of citizenship and also upon the alleged unconstitutionality of certain municipal ordinances under the Federal constitution, a direct appeal would lie. So, also, it was held that a suit to establish a land claim by virtue of a treaty could be properly brought by direct appeal from the Circuit Court to the Supreme Court of the U. S.

Mitchell v. *Furman*, 180 U. S. 402.

Respectfully submitted.

EDWIN C. BRANDENBURG,
Attorney for Appellees.

R. D. HILL and
NEAL BROWN,
of Counsel.

Supreme Court of the United States.

October Term, 1904.

M. H. COURTNEY, *Appellant*,
v.
LOUIS A. PRADT, Executor of MERRIT B. ATWATER, and WILLIAM C. ATWATER, *Appellees.*
No. 93.

APPELLEES' BRIEF ON MERITS.

Before proceeding to brief this case on its merits, we respectfully request the attention of the Honorable Court to the motion of the appellees, statement of facts on which same was made, and brief thereon, filed during the last term, but passed by the Honorable Court for final disposition until the hearing of the case on its merits. We respectfully reiterate our contention that this Honorable Court has no jurisdiction of the appeal, for the reason set out in said papers, and insist that the appeal should, for that reason, be dismissed.

Statement of the Case.

Accompanying the motion above named, will be found a statement of the facts on which the motion is based. From that statement, we copy largely in giving the facts pertaining to the merits.

On the 25th day of September, 1901, the appellant, M. H. Courtney, filed a petition in equity in the Powell Circuit Court, Kentucky, against the above-named appellees. By said petition he stated, in substance, that, in

1890 and prior thereto, Merrit B. and Wm. C. Atwater were partners under the firm name of M. B. Atwater & Company; that prior to the 10th of December, 1890, the appellant (plaintiff, in the court below) had rendered valuable services for said partnership, and there was a difference between appellant and said partners as to the amount appellant was entitled to receive for said services; that said partners, in order to adjust the said difference, proposed, by letter of December 10, 1890, to give to appellant, in satisfaction of his claim, stock in the Atwater & Fair Lumber Company, a Wisconsin corporation, of the face value of $5,000, with a guarantee that it was worth $8,000, and that said firm would, at the end of that season's cut, pay appellant $8,000 in cash therefor; that appellant accepted said proposition, by letter, and, at the end of the season's cut, demanded of said partners a fulfillment of their offer; but his demand was not complied with, and that said partners wholly failed and refused to transfer to said appellant said stock, or pay him said sum of $8,000, or any part thereof; that in the year 1898, the said Merrit B. Atwater, a citizen of Wisconsin, died testate, and appointed Louis A. Pradt his executor; that said will was duly probated by the County Court of Marathon County, in the State of Wisconsin, and that said Louis A. Pradt had duly qualified as such executor and is now acting as such. The petition further stated that said Merrit B. Atwater, by his will, devised to his daughter, Charlotte R. Pradt, his residence in the city of Wausau, Wis.; to Sarah Downs, $1,000; to defendant Wm. C. Atwater, all of his right, title and interest in and to The Seamless Structural Company, of Milwaukee, Wis.; and the residue of his estate—real, personal and mixed—to his wife, Charlotte Atwater, for and during her natural life, and, after her death, he bequeathed and devised to said Wm. C. Atwater an undivided one-sixth interest in

said residue. The petition further stated that, the Atwater & Allen Land and Lumber Company (a different corporation from the Atwater & Fair Lumber Company, above mentioned, also a Wisconsin corporation),

> "Is a corporation duly created by and organized under the laws of the State of Wisconsin, with power to buy, sell, own and hold real estate in the State of Kentucky, and that prior to August, 1901, said corporation did buy and own real estate in the State of Kentucky, and practically all of its assets consisted of real estate in the said State of Kentucky. Plaintiff states that, during the month of August, 1901, said corporation sold its said real estate and realized a large sum of money therefor, and that practically the only business ever done by said corporation was to buy, own, hold and sell said real estate in the State of Kentucky.
>
> "Plaintiff states that Merrit B. Atwater, at the time of his death, *owned stock in said corporation*, and plaintiff states that said corporation now owes to the defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, a large sum of money as such executor. That the chief office and place of business of said corporation in the State of Kentucky is in Clay City, Powell County, Kentucky, and that said corporation has an agent resident there, upon whom a summons can be served." (Printed record, page 3.)

The allegation, just quoted, was for the purpose of procuring, and was followed by an attempt to state grounds for, a general order of attachment against the *property belonging to the estate of Merrit B. Atwater, located in Kentucky.* A further statement followed, that appellant knew of no other creditors of the said Merrit B. Atwater, deceased, in Kentucky, and that the assets of the estate of the said Merrit B. Atwater, in Wisconsin, exclusive of the stock held by him in the Atwater & Allen Land and Lumber Company was more than sufficient in value, to

pay all of the debts of said estate owing to creditors outside of the State of Kentucky.

Appended to said petition was the following prayer:

> "Wherefore, plaintiff prays for judgment against the defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater, and each of them, for the sum of $8,000, with interest thereon at the rate of six per cent. per annum, from the 1st day of November, 1891, until paid, and for his costs herein, and prays for a general attachment against the property of said defendants, including debts owing to them, or either of them, and any choses in action, stocks, legal or equitable interests they may have in stocks or other property, and, that the same, when attached, may be subjected and applied to the satisfaction of plaintiff's claim herein, and further prays for all (general), equitable and proper relief." (Pages 1 to 4.)

At the filing of said petition, a general order of attachment was procured and directed to and placed in the hands of the sheriff of Powell County to execute. A copy thereof can be found on page 6 of the record, and is as follows:

"POWELL CIRCUIT COURT.

M. H. Courtney, Plaintiff, *v.* Louis A. Pradt, Executor of Merrit B. Atwater, Deceased, and William C. Atwater, Defendants.	Order of Attachment.

"The Commonwealth of Kentucky to the sheriff of Powell County:

"You are commanded to attach and safely keep the property of the defendants, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater, in your county, not exempt from execution or so much thereof as will satisfy the claim of

the plaintiff in this action for twelve thousand eight hundred dollars ($12,800.00) and $100.00 for the costs of the action and to summons the Atwater & Allen Land and Lumber Company—the garnishee—to answer herein on the first day of the next March term of the Powell Circuit Court, and make due return on this order on that day.

"Witness, A. H. Norton, clerk of said court, this 25th day of September, 1901. A. H. Norton,
Clerk, P. C. C."

Counsel for plaintiff in said case, appellant here, endorsed the object of the action upon said general order of attachment, as follows:

"To the Atwater & Allen Land and Lumber Company:

"The object of this action is to attach any money owing by you to the defendants or either of them and to prevent you from paying to them, or either of them, or to any one for them, and to compel you to answer as garnishee herein and hold said money subject to the order of the court—and further to attach the capital stock in said Atwater & Allen Land and Lumber Company belonging to the defendants, or either of tham, and any legal or equitable interest of the defendants therein.

"W. B. Dixon,
"*Attorney for Plaintiff.*"

(Pages 6 and 7 of the record.)

This endorsement was made in pursuance of sub-section 3 of section 203 of Kentucky Civil Code of Practice, which fixes the manner in which a garnishee may be summoned:

"by delivering a copy of the order, with a notice specifying the property attached, to the person holding it; or, as to a debt or demand, to the person owing it (*d*); or, as to stock in a corporation, or property held, or a debt or demand owing, by it, to the officer or agent upon whom a summons may be

served according to the provisions of Sec. 51, and by summoning the person or corporation to answer as a garnishee in the action."

The only execution of said order of attachment the said sheriff attempted to make was to summon the said Atwater & Allen Land and Lumber Company (said last above named Wisconsin corporation) to answer as a garnishee. The sheriff's return is as follows:

"Executed the within attachment on the Atwater & Allen Land and Lumber Company by delivering to Edward Rhubusky, the duly appointed agent of said Atwater & Allen Land and Lumber Company a copy of the within attachment, and summoning said Atwater & Allen Land and Lumber Company to answer as garnishee this September 25, 1901.

"T. B. WARE, *S. P. C.*
"J. M. WELCH, *D. S.*"

The Edward Rhubusky named in the above return of the sheriff, had been designated by the Atwater & Allen Land and Lumber Company as its agent upon whom process could be executed, as required by Section 571, Kentucky Statutes, that company having theretofore transacted business in Kentucky. Said Section 571 is as follows:

"All corporations except foreign insurance companies formed under the laws of this or any other State, and carrying on any business in this State shall at all times have one or more known places of business in this State and an authorized agent or agents thereat, upon whom process can be served; and it shall not be lawful for any corporation to carry on any business in this State until it shall have filed in the office of the Secretary of State a statement signed by its president or secretary, giving the location of its office or offices in this State, and the name or names of its agent or agents

thereat upon whom process can be served; and when any change is made in the location of its office or offices, or its agent or agents, it shall at once file with the Secretary of State a statement of such change; and the former agent shall remain agent for the purpose of service until statement of appointment of the new agent is filed, and if any corporation fails to comply with the requirements of this section, such corporation, and any agent or employe of such corporation, who shall transact, carry on or conduct any business in this State, for it, shall be severally guilty of a misdemeanor, and fined not less than one hundred nor more than one thousand dollars for each offense."

On the 19th of March, 1902, the said Atwater & Allen Land and Lumber Company filed, in said State court, its answer as garnishee, which can be found on pages 7 and 8 of the record, and is as follows:

"The Atwater and Allen Land and Lumber Company, a corporation organized and existing under the laws of the State of Wisconsin, summoned herein as garnishee, says that said M. B. Atwater in his life time owned two hundred and fifty shares of the capital stock of said company of the par value of $45.00 per share, and owned said two hundred and fifty shares at the time of his death and that said shares now stand on the book of said company in the name of said M. B. Atwater and are now held by L. A. Pradt who is the executor of the estate of the said M. B. Atwater.

"That on the 30th day of August, A. D. 1901, a dividend was declared by the directors of said company at a meeting held on that date.

"That the indebtedness to said Pradt, as executor of said M. B. Atwater, deceased, on account of said dividend is $4,757.37 and that said amount is being held by the Atwater & Allen Land and Lumber Company, awaiting the decision of this court.

"Said Atwater & Allen Land and Lumber Com-

pany does not owe anything to said W. C. Atwater who is now a stockholder in said company,

"The said W. C. Atwater has not been a stockholder in said company since the year 1893 and was not a stockholder at the time of the declaration of said division on the 30th day of August, A. D. 1901."

After said answer was filed, to wit, on the 21st day of March, 1902, the said defendants filed in said State court, their petition for removal to the Circuit Court of the United States for the Eastern District of Kentucky, which petition is copied on page 8 of the record. On the filing of that petition the bond of petitioners to be executed on the removal of the case, was presented, accepted, and approved by the State Court, and an order entered removing the case for trial to said Circuit Court. (Record, pages 10 and 11.) After the record was copied and filed in said Circuit Court, to wit, on September 9, 1902, the following motion was entered:

"The defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, and William C. Atwater, entering their appearance herein for the purpose of this motion only, move the court to dismiss this cause for a want of jurisdiction to try same." (Page 13.)

At the same time the said Louis A. Pradt, executor, as aforesaid, filed a special demurrer, setting forth his grounds therefor:

1st. That the court has no jurisdiction of the person of this defendant.

2d. That the court has no jurisdiction of the subject matter of the action.

3d. That the complaint does not state facts sufficient to constitute a cause of action.

4th. That it appears upon the face of the said bill of

complaint that this action was not commenced within the time limited by law; to-wit, within the time limited by——.

5th. That the plaintiff is not entitled upon said bill to the relief he prays for because he has a plain and adequate remedy at law.

6th. That the plaintiff hath not in and for his said bill stated such a case as entitled him a court of equity to any discovery from this defendant or to any relief against him as to the matters contained in the said bill of complaint or any of such matters, and that said bill doth not contain any matter of equity whereon this court can ground any decree or give to the plaintiff any relief against this defendant.

At the time the above motion was made and special demurrer filed, the appellant moved the court to remand the case to the State court, but stated no grounds therefor. His motion was as follows:

> "The plaintiff, M. H. Courtney, moves the court to remand this case to the State court from whence it was removed. Breckinridge and Shelby and W. B. Dixon, attorneys for plaintiff." (Page 12.)

Both said motion and demurrer were submitted (page 13). Afterwards, the court filed two opinions thereon (pages 15 to 24). The first of these opinions held that the motion to remand should be overruled (page 18). And both of them held that the motion to dismiss should prevail. A decree was entered in pursuance to said opinion, overruling appellant's motion to remand and sustaining the defendant's motion to dismiss for want of jurisdiction, and noting the fact that on the entering of said decree the plaintiff filed a petition for appeal and an assignment of errors, and that his appeal was allowed as prayed for, which decree is as follows:

"This cause having been heard and submitted on the plaintiff's motion to remand this case to the State court, and on the defendant's demurrer to the jurisdiction of this court, and the motion of the defendant to dismiss this case for want of jurisdiction in this court, and the court being fully advised, it is ordered that the plaintiff's motion to remand this case to the State court be and it is hereby overruled to which plaintiff excepts.

"It is further ordered, adjudged and decreed that defendant's demurrer to the jurisdiction of this court and motion to dismiss this suit for want of jurisdiction in this court, be and the same are hereby sustained, and that this suit be and the same is hereby dismissed for want of jurisdiction in this court. And thereupon came plaintiff in open court and filed his petition for an appeal and assignment of errors, and prayed an appeal to the Supreme Court of the United States from this final decree in dismissing said suit for want of jurisdiction in this court, which appeal is hereby allowed upon the execution of a bond in penalty of $500.00 by plaintiff, M. H. Courtney, with good and sufficient security that appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, which bond shall operate as a supersedeas."

Appellant's petition and assignment of errors are as follows:

"The above-named plaintiff, M. H. Courtney, conceiving himself aggrieved by the final decree, order and judgment, this day entered in the above entitled cause, dismissing this suit for want of jurisdiction, hereby appeals therefrom and prays that this, his appeal to the Supreme Court of the United States may be allowed, and that a transcript of the record and proceedings and papers upon which said final decree, order and judgment was made, duly authenticated, may be sent to said Supreme Court of the United States, and plaintiff states that the said final

decree, order and judgment contains manifest errors to his prejudice committed, and assigns the following errors, to wit:

I.

"The court erred in overruling and in not sustaining plaintiff's motion to remand this cause to the State court.

II.

"The court erred in sustaining and in not overruling defendant's demurrer to the jurisdiction of this court.

III.

"The court erred in sustaining and in not overruling the defendant's motion to dismiss this suit for want of jurisdiction in this court.

IV.

"The court erred in dismissing this suit for want of jurisdiction in this court.

"Wherefore, this petitioner says that the final decree, order and judgment aforesaid is erroneous, and prays this honorable court to grant him an appeal to the Supreme Court of the United States to the end, that said decree may be reversed, and that said errors may be corrected, and so he will ever pray." (Record, pages 25 and 26.)

No question as to the jurisdiction of the Circuit Court was certified to this court by the Circuit Court for decision, and no application was made to the Circuit Court for such certificate. The appellant has had the entire record copied.

ARGUMENT.

In amplification of the very conclusive opinions of the court below, we present the following:

There was no claim that either of the defendants resided

in, or had any property in, the State of Kentucky capable of manual delivery.

As to the defendant William C. Atwater, no effort was made to reach any property or effects belonging to him, in any jurisdiction. On this point the court below, in its opinion filed the 9th of September, 1902, stated:

> "It is certain that the State court had no jurisdiction so far as William C. Atwater, the surviving partner, was concerned, unless it had jurisdiction of the suit as against the foreign executor of the deceased partner. It is not alleged that William C. Atwater has any property in this State, and the attachment has not been levied upon any property of his, save so far as he may be interested in the property levied on as the property of the deceased partner. The suit should be treated, therefore, as if it were a suit against the foreign executor alone." (Record, page 15.)

No personal service of process on either of the defendants was had or attempted. Appellant's only effort was to reach, by means of the attachment, the stock of Merrit B. Atwater, in the Wisconsin corporation, the Atwater & Allen Land and Lumber Company, and the dividend that had been declared in favor of said Merrit B. Atwater's executor, since his death. The allegations of appellant's petition in that respect are as follows:

> "Plaintiff states that Merritt B. Atwater, at the time of his death, owned stock in said corporation (meaning the Atwater & Allen Land and Lumber Company), and plaintiff states that said corporation now owes the defendant, Louis A. Pradt, executor of Merrit B. Atwater, deceased, a large sum of money as such executor." (Record, page 3.)

The answer of the Atwater & Allen Land and Lumber Company, upon whom only the order of attachment was

attempted to be executed, shows that William C. Atwater is not a stockholder therein, and that that corporation is not indebted to him in any amount. (Record, pages 7 and 8.) The correctness of that answer was never questioned in the court below.

The appellee executor contends that appellant's attachment sued out in the State court, gave to the State court no possible jurisdiction over said stock or dividend, for the following reasons:

First. *Shares of stock in a foreign corporation are not subject to attachment issued by a Kentucky court, although officers of such corporation are carrying on the corporate business in Kentucky.* Thompson's Commentaries on the Law of Corporations, Vol. 2, Sec. 2786; Clark & Marshall on Private Corporations, Vol. 2, page 1152, Sec. 377; Cook on Corporations, Sec. 485; New Jersey Sheep & Wool Co. v. Traders Deposit Bank, *et al.*, 104 Kentucky, page 90 (46 S. W. 677); Pinney v. Nevills, *et al.*, 86 Fed. Rep., 97. In this suit it is nowhere claimed that the said Wisconsin corporation has been vested with the character and status of a domestic corporation in Kentucky.

In Kentucky there is no statute that attempts to create a way by which shares in a foreign corporation can be reached by attachment in the Kentucky courts. Section 194, Kentucky Code of Practice, provides:

> "The plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant, including garnishees as provided in section 227, as a security for the satisfaction of such judgment as may be recovered—
>
> "I. In an action for the recovery of money against—
>
> "1. A defendant who is a foreign corporation * * *"

Section 203 of said Code provides:

"The order of attachment shall be executed by the sheriff without delay in the following manner * * *

"Upon other personal property, by delivering a copy of the order, with a notice specifying the property attached, to the person holding it, or as to a debt or demand, to the person owing it; or, as to stock in a corporation, or property held, or a debt or demand owing by it, to the officer or agent upon whom a summons may be served according to the provisions of § 51, and by summoning the person or corporation to answer as a garnishee in the action."

Sub-section 3 of Section 51 provides:

"In an action against a private corporation the summons may be served, in any county, upon the defendant's chief officer, or agent, who may be found in this State; or it may be served in the county wherein the action is brought upon the defendant's chief officer or agent who may be found therein."

Section 211 of the Constitution of Kentucky provides; that, no railroad corporation shall have certain rights until it shall become a body corporate pursuant to and in accordance with the laws of Kentucky.

Section 841, Kentucky Statutes, provides that no corporation created by the laws of any State or country other than Kentucky shall control, or own, or operate, a railroad in this State until it, by incorporation, shall become a corporation, citizen, and resident of this State. And then provides that it shall become such citizen and become incorporated in Kentucky by filing in the office of the Secretary of State, and in the office of the Railroad Commission, a copy of its charter, or articles of incorporation.

Section 2786, Thompson's Commentaries, states:

"So far as the writer knows, all the States which prescribe the manner of levying upon shares of corporate stock by execution or attachment, prescribe

that it shall be done by giving *notice* to the corporation, or to its secretary, or to the officer having charge of its books—this notice to the officer in charge of the corporate books being essential to the validity of the seizure. The effect of such a statutory provision necessarily is to make the *situs* of the corporate shares for the purpose of the levy of an execution or attachment the *situs* of the corporation itself. It follows that shares owned by a non-resident defendant in the stock of a foreign corporation can not be reached and levied upon by virtue of an attachment, although officers of the corporation are in the State of the forum, engaged in carrying on the corporate business there."

In said section of Clark & Marshall, the authors discuss the *situs* of shares for the purpose of execution or attachment, saying:

"Their *situs* for the purpose of execution or attachment is held to be in the State where the corporation resides, that is, the State by or under the laws of which the corporation was created, and it has been held, therefore, that they cannot be levied upon in another State, and that it makes no difference that the debtor resides there, or that the certificates of the stock are found there."

Cook on Corporations, Sec. 485, says:

"All attachment statutes provide for the attachment of a non-resident's property in the State, and generally, under such statutes, the stock owned by a non-resident in a corporation, created by the State wherein the suit is brought, may be attached and jurisdiction be thereby acquired to the extent of the value of the stock attached, but a defendant's shares of stock can not be reached by levy of attachment in an action commenced outside of the State wherein the corporation is created. For the purposes of attachment, stock is located where the corporation is

> incorporated, and nowhere else. The shares owned by a non-resident defendant in the stock of a foreign corporation can not be reached and levied upon by virtue of an attachment, although officers of the corporation are within the State engaged in carrying on the corporate business."

Each one of the above-named authors cites various cases and authorities in support of the doctrine announced by them.

In the case of New Jersey Sheep and Wool Co. *v.* Traders Deposit Bank, *et al.*, 104 Ky., 90, the Traders Deposit Bank filed suit in Kentucky against a partnership styled Pidcock & Rodgers, composed of three of the Pidcocks and one John Rodgers, on an indebtedness amounting to more than $3,000.00. Rodgers was brought before the court by personal service. The Pidcocks were sued as non-residents, and were before the court by constructive service only. The New Jersey Sheep and Wool Co., a corporation created under the laws of New Jersey, and R. H. Kyle, its agent, were made defendants, and the summons and order of attachment were served on Kyle individually and as the agent of the wool company. The petition averred that the Pidcocks were stockholders in that corporation, that each of them owned enough paid up and unincumbered stock and undivided profits or surplus therein, subject to distribution, to more than pay the plaintiff's demand. On the question as to whether the plaintiff bank could subject to the payment of its debt the stock in said foreign corporation, the Court of Appeals of Kentucky says:

> "The court did not have jurisdiction to sell the stock which the Pidcocks held in the foreign company."

In support of this statement, the court copies with ap-

proval so much of section 485 of Cook on Corporations as is quoted above.

In the case of Pinney *v.* Nevills, U. S. Circuit Court of Mass., 86 F. R., 97, the facts were practically the same as in the case at bar. The opinion of Judge Colt in that case is as follows:

> "This suit was originally brought in the State court, and removed to this court. The plaintiff is a citizen of Massachusetts, and the defendants are citizens of California. No personal service was made on any of the defendants. The only service which was made was by attachment of certain certificates of stock belonging to the defendants, in the hands of the National Bank of the Republic, located in Boston. These were certificates of stock of the Rawhide Gold-Mining Company, a corporation organized under the laws of West Virginia. The question presented on these motions is whether shares of stock in a foreign corporation owned by a non-resident defendant can be reached by process of attachment under Massachusetts law. The statutes of Massachusetts provide that shares of stock in a corporation organized under the laws of the State, or under the laws of the United States, where such corporation has a usual place of business in the State, may be attached. Pub. St. Mass. c. 161, § 71; Id. c. 171, § 45. There is no provision in the Massachusetts statutes that shares of stock in a foreign corporation can be reached by attachment, except in the case of a corporation organized under the laws of the United States. The general rule of law is that shares of stock in a foreign corporation owned by a non-resident defendant are not subject to attachment. Plympton *v.* Bigelow, 93 N. Y. 592; Ireland *v.* Reduction Co., 19 R. I. 180, 32 Atl. 921; Denton *v.* Livingston, 9 Johns, 96; Winslow *v.* Fletcher, 53 Conn. 390; 4 Atl. 250; Smith *v.* Downey, (Ind. App.) 34 N. E. 823. Motions granted. Case dismissed for want of jurisdiction."

Second. *Said appellee also contends that the dividend due him as a Wisconsin executor from the Atwater & Allen Land and Lumber Company, is not subject to attachment by a Kentucky court, for the reason that he is not, in his representative character, subject to suit in the courts of Kentucky.* On this subject he cites the following authorities:

Vaughn *v.* Northup, 15 Peters, 1;
Am. & Eng. Encyc. of Law, 2d Ed., Vol. 13, p. 957;
Story on Conflict of Laws, Sec. 513;
Cardwell *v.* Harding, *et al.*, 5 Blatch. 510; Fed. Cases, Vol. 4, p. 1036;
Security Insurance Company *v.* Taylor, Fed. Cases, No. 12,607, Vol. 21, p. 973;
Mellus *v.* Thompson, *et. al.*, Fed. Cases, 9405, Vol. 16, p. 1334;
Marrett *v.* Babb, 91 Kentucky, 88;
Maysville R. R. & T. Co. *v.* Marvin, 59 F. R., 91;
L. & N. R. R. Co. *v.* Brantley, 96 Kentucky, 297;
Smith *v.* Baker, 3 Metcalfe (Ky.), 264.

"This is an appeal from a decree of the circuit court of the District of Columbia, sitting for the county of Washington, dismissing a bill in equity, brought by the appellants against the appellees. The facts, so far as they are necessary to be stated upon the present occasion, are: that one James Moody, an inhabitant of Kentucky, died in that State, about the year 1802, intestate, without leaving any children; that in May or June, 1833, the defendant, Northup, obtained letters of administration upon his estate, from the proper court of Jefferson County, in Kentucky; and afterwards, under and in virtue of those letters of administration, he received from the Treasury of the United States the sum of $5,215.56, for money due to the intestate, or his representatives, for military services rendered during the revolutionary war. The present bill was brought by the appellants,

claiming to be the next of kin and heirs of the intestate, for their distributive shares of the said money, against Northup, as administrator; and the other defendants, who are made parties, are asserted to be adverse claimants, as next of kin and distributees. At the hearing of the cause in the court below, the same having been set down for argument upon the plea of Northup, denying the jurisdiction of the court; the bill was ordered to be dismissed for want of jurisdiction; and from that decree, the present appeal has been taken.

"Under these circumstances, the question is broadly presented, whether an administrator, appointed and deriving his authority from another State, is liable to be sued here, in his official character, for assets lawfully received by him, under and in virtue of his original letters of administration. We are of opinion, both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries. It can not confer, as a matter of right, any authority to collect assets of the deceased, in any other State; and whatever operation is allowed to it beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he receives, under and in virtue of his administration, to the proper tribunals of the government from which he derives his authority; and the tribunals of other States have no right to interfere with or to control the application of those assets, according to the *lex loci*. Hence, it has become an established doctrine, that an administrator, appointed in one State, can not, in his official capacity, sue for any debts due to his intestate, in the courts of another State; and that he is not liable to be sued in that

> capacity, in the courts of the latter, by any creditor, for any debts due there by his intestate. The authorities to this effect are exceedingly numerous, both in England and America; but it seems to us unnecessary, in the present state of the law, to do more than to refer to the leading principle as recognized by this court, in Fenwick *v.* Sears, 1 Cranch, 259; Dixon's Executors *v.* Ramsay's Executors, 3 *Ibid.* 319; and Kerr *v.* Moon, 9 Wheat, 565. (Vaughn *v.* Northup, *supra*, at pages 3 and 5).

In 13 Am. & Eng. Encyc. of Law, the general rule is stated as follows:

> "An executor or administrator can not be sued in his representative character unless he is made liable by statute, either at law or in equity, in the courts of any State or country other than that in which he has received his appointment."

And a number of decisions of the courts of England, the courts of the United States, and of the States of Alabama, Arkansas, Connecticut, Florida, Illinois, Iowa, Kentucky, Massachusetts, Missouri, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, and West Virginia are cited in support of that statement.

In Story on Conflict of Laws, Sec. 513, the author says:

> "It has hence become a general doctrine in the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator, in his official capacity in the courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary or the letters of administration there granted to him."

In the case of Cardwell *v.* Harding, *et al.*, 5 Blatch., 510, Judge Shipman held:

> "No action can be maintained against an executor or administrator founded on a debt due from the estate of the deceased, unless he has been duly qualified by a probate tribunal in the State and county where the suit is brought."

In the case of Security Insurance Co. *v.* Taylor, Fed. Cases No. 12,607, being a suit in which an executor was appointed in the State of Wisconsin, but actually summoned in the district in which the suit was pending, it was held by District Judge Blodgett that his court had no jurisdiction. In his opinion, Judge Blodgett says:

> "The law is well settled that executors and administrators can not act out of the jurisdiction in which they are appointed, except by complying with the statutory provisions made by comity in such exterior jurisdiction. For instance, an executor in another State may have ancillary administration in this State, for certain purposes, under the statutes of this State, by probating the will here; in which case the authorities of this State will respect his character as executor, and allow him to proceed and sell or control such portion of the estate as lies within this jurisdiction. This rule, a rule of legislative interstate comity, holds in nearly all the States, as far as my investigation has gone; but it does not in any way override or otherwise compromise the general principle that the power of an executor or administrator is local. In this case the process of this court can not reach the administrators or executors of Emeline Taylor, unless they have made themselves executors within the jurisdiction of this court. This they have not done, and the mere fact that one of the executors came within the jurisdiction of the court upon other business, does not make him amenable to the process of this court in his representative capacity; his official mantle falls when he leaves the jurisdiction in which he was appointed. If persons having claims against the estate of Emeline Taylor wish to pursue their remedy here, they must either take out

letters of administration against the estate in this jurisdiction, or procure the executors to probate the will within this State, before the courts of this State, either State or Federal, can obtain jurisdiction *in personam* of the executors, or of the property of the decedent."

In the case of Nellis *v.* Thompson, Fed. Cases, No. 9405, it was held:

"Repeated decisions have affirmed the principle that no suit can be maintained by or against an executor or administrator, in his official capacity, in the courts of another State except that from which he derived his authority, in virtue of the probate and letters testamentary or the letters of administration there granted to him. Febwick *v.* Sears, 1 Cranch (5 U. S.) 259; Dixon's Ex'rs *v.* Ramsey's Ex'rs, 3 Cranch (7 U. S.) 319; Kerr *v.* Moon, 9 Wheat. (22 U. S.) 565; Armstrong *v.* Lear, 12 Wheat. (25 U. S.) 169. Some attempts have been made by courts of justice in one or two jurisdictions to limit and qualify the general rule laid down in the earlier cases, but without success, as appears in numerous decisions both in this country and in England; and it may now be regarded as the established doctrine, that an executor or administrator appointed in one State can not sue or be sued in his official character for any debts due to or from the estate under his administration in any other State, unless he is first appointed as such administrator or executor in the State where the suit is brought."

In the case of Marrett *v.* Babb, it was held that a foreign personal representative could not sue to recover a debt due his decedent without complying with the provisions of sections 3878 and 3879, Kentucky Statutes, which provide:

"§ 3878. Non-resident representatives—action by. By giving bond with surety, resident of the county

in which the action is brought, non-resident executors or administrators of persons who, at the time of their death, were non-residents of this Commonwealth, may prosecute actions for the recovery of debts due to such decedents.

"§ 3879. Letters of administration—bond to be *executed—action on* bond. In such actions the plaintiff's letters, testamentary or of administration, granted by a competent tribunal, properly authenticated, must be filed; and no judgment shall be rendered until the plaintiff executes bond, with good surety, resident of the county, to the Commonwealth, conditioned to pay any debt due by his decedent to any resident of this State to the extent assets shall come to his hands. Actions may be brought on this bond for the use of any creditor of such decedent for three years after the date of each receipt of assets by such executor or administrator in this State, but not after."

In the case of Maysville Street R. R. & T. Co. *v.* Marvin, and L. & N. R. R. Co. *v.* Brantley, it is held that a foreign personal representative can not sue in Kentucky to recover an estate, other than a debt due to the decedent.

In the case of Smith *v.* Baker, 3 Metcalfe, 264, decided by the Kentucky Court of Appeals, it is expressly held that a suit can not be maintained against a foreign personal representative in Kentucky, where he has not removed into this State and brought with him the assets belonging to the estate. The court, in an opinion by Judge Duvall, says:

"An administrator or executor, who is appointed, or who qualifies in another State, and there receives assets into his hands, may be sued in the tribunals of this State by the person or persons entitled to such assets, *if he shall have removed to and settled in this State.* Such seems to be the well-settled doctrine. (Manion's Adm'r *v.* Titsworth, 18 B. Mon. 597, and cases there cited.)

"But the right to sue a foreign administrator has never been extended further, and in a case like the present, where the debtor died in another State, the administrator having been appointed and qualified there, and being a resident of such State, no action can be maintained against such foreign administrator, in the courts of this State, by a creditor of his intestate. The rule is thus stated by Judge Story: 'If a creditor wishes a suit to be brought in any foreign country, in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country, is not suable there and has no positive right to, or authority over those assets, neither is he responsible therefor.' (Story on Conflict of Laws, sec. 513.)"

Third. *Appellee still further contends that, the laws of Kentucky nowhere provide for or allow the attachment of assets of a foreign estate if found in reach of Kentucky courts.* Sections 3898 to 3900 provide:

§ 3898. "When administration shall be taken in this Commonwealth on the estate of any person who was an inhabitant of any other State, his personal estate found here, after payment of his debts to citizens of this Commonwealth, shall be disposed of according to his last will, if he shall have executed any, according to the law of his domicile. If there be no such will, his personal estate shall be distributed and disposed of according to the laws of the State of which he was an inhabitant."

§ 3899. "Upon the settlement of such estate, after the payment of the debts in this Commonwealth, the residue of the personal estate, if any, may be distributed and disposed of in the manner stated in the next preceding section; or it may be transmitted, as the county court may think best and order, to the personal representatives, if there be any,

in the State where the decedent had his domicile to be there disposed of according to the law thereof."

§ 3900. "If such person's estate found in this Commonwealth shall be insufficient to pay the creditors here it shall be disposed of without preference, *pro rata*, among the creditors here and such of those elsewhere as prove and demand their debts here within two years after the appointment of a personal representative here. But there must be deducted from such foreign debts the amount received, or which can be received, by the foreign creditors from assets and estate not in this Commonwealth; and if the foreign assets and estate be sufficient to pay all the foreign debts, then no part of them shall be allowed or paid here."

Sections 3878 to 3880 provide:

§ 3878. "By giving bond, with surety, resident of the county in which the action is brought, non-resident executors or administrators of persons who, at the time of their death, were non-residents of this Commonwealth, may prosecute actions for the recovery of debts due to such decedents."

§ 3879. "In such actions the plaintiff's letters, testamentary or of administration, granted by a competent tribunal, properly authenticated, must be filed; and no judgment shall be rendered until the plaintiff executes bond with good surety, resident of the county, to the Commonwealth, conditioned to pay any debt due by his decedent to any resident of this State to the extent assets shall come to his hands. Actions may be brought on this bond for the use of any creditor of said decedent for three years after the date of each receipt of assets by such executor or administrator in this State, but not after."

§ 3880. "If there be an executor or administrator of such decedent qualified by a court of this Commonwealth, he alone shall have power to sue; but any debtor who shall pay his debt, or part of it, according to the provisions of the foregoing sections,

> without notice thereof, shall be discharged to the extent of such payment."

These sections provide a complete system by which such assets can be reached by a resident creditor. Such creditor is nowhere allowed the remedy by attachment, and there is no law by which one of such creditors can secure for himself a preference. In the case of Smith *v.* Baker, *supra*, the Kentucky Court of Appeals states the rule to be as follows:

> "If a creditor wishes a suit to be brought in any foreign country, in order to reach the effects of a deceased testator or intestate situated therein, it will be necessary that letters of administration should be there taken out in due form, according to the local law, before the suit can be maintained; for the executor or administrator appointed in another country, is not suable there, and has no positive right to, or authority over, those assets, neither is he responsible therefor."

We respectfully submit that the judgment of the court below should be affirmed.

EDWIN C. BRANDENBURG,
Attorney for Appellees.

R. D. HILL and
NEAL BROWN,
Of Counsel.

Supreme Court of the United States.

October Term, 1904.

M. H. COURTNEY, *Appellant*,
v.
LOUIS A. PRADT, Executor of MERRIT B. ATWATER, deceased, and WILLIAM C. ATWATER. } No. 93.

APPELLEES' SUPPLEMENTAL BRIEF.

The filing of the brief for appellant was delayed to so short a time before the probable date of hearing of this case, that it became necessary for counsel for appellees to prepare their brief on the merits before having seen appellant's brief, and accordingly this supplemental argument in reply to some of the contentions of appellant seems justified.

The case is presented to this court by the appellant as though the situation were as follows: That the plaintiff had instituted proceedings in his own State of Kentucky to collect his claim against the decedent's estate, at that time in process of administration in the State of Wisconsin, by garnishing the debt of a Wisconsin corporation to the executor of such estate, which debt had its undoubted *situs* in Kentucky by reason of the presence of the Wisconsin corporation in Kentucky through its business operations there; that there was danger that the executor of the estate would collect said debt and withdraw it from Kentucky and distribute it in a foreign jurisdiction, and

thus leave the plaintiff without remedy; that the plaintiff asked nothing more than that through the medium of his attachment proceedings the executor might be prevented from collecting and withdrawing said debt from Kentucky, and thus leaving the plaintiff without remedy; that the result of such proceedings would be to interfere in no wise with those assets of the executor within control of the probate court in Wisconsin having administration of the estate.

But this plausible showing finds but slender foundation in the facts as they appear in the record. The facts are that a portion of the assets of this estate which passed into the possession of the executor was two hundred and fifty shares of stock in the Wisconsin corporation, of the par value of $45 per share, the assets of which corporation practically consisted of real estate in the State of Kentucky (plaintiff's petition, rec., p. 3; answer of garnishee, Atwater & Allen Land & Lumber Company, rec., p. 7); that in August, 1901, before the commencement of this action and after the executor had been in possession of such stock for about three years, the corporation sold this real estate, which, as above stated, practically constituted all its assets, and out of the proceeds of such sale had declared a dividend, the share of said executor therein being $4,575.37. This dividend represented, *pro tanto*, the stock of the corporation in the possession of the executor, and was subject to be paid to him upon demand by the treasurer of said company; that is to say, this dividend was a part of the assets of the estate represented by the executor equally within the jurisdiction of the probate court of Wisconsin from which he had received his letters testamentary as the stock itself and ready to be reduced to the possession of the executor upon his simple demand therefor, and thus the liability of the corporation, or more properly of the treasurer of

the corporation who had custody of the same, to the executor for the payment of such dividend, was unqualifiedly and absolutely in the State of Wisconsin.

These are the facts, and out of which the appellant constructs a debt in the ordinary sense of the word owed by the corporation to the executor and having its *situs* in Kentucky, because of the former business operations of the corporation in that State, ~~whom~~ which there was danger that the executor would collect in Kentucky and remove the proceeds from that State.

Additional emphasis is lent to the foregoing statement by the fact that, as shown by the record, the garnishee corporation had before the garnishment sold all its property in Kentucky and practically ceased to do business there (plaintiff's petition, rec., p. 3), and it is clearly because of this fact that the petition of the plaintiff does not contain the usual allegation in pleading relating to foreign corporations, that it was doing business at the time in the State in which the action was brought. Thus it appears that to all intents and purposes the corporation had ceased to be present in Kentucky for any purpose. Its officers were in Wisconsin; the proceeds of its only assets were in Wisconsin; and there was plainly nothing left for it to do but to wind up its corporate affairs in Wisconsin. There was left, to be sure, a trace of its former presence in Kentucky in the shape of the person whom it had appointed at the time that it began to operate in Kentucky, as its agent upon whom service against it might be made in that State. This appointment had been made in compliance with the statute of Kentucky making such appointment a condition of its right to do business in the State, but it would seem that his functions as such agent had practically ceased with the termination of all business of the corporation in the State.

The statement that if the plaintiff is not allowed the benefit of this action he will be without remedy, is equally

unsupported by the facts appearing in the record. As shown in our principal brief (pages 24 to 26), the statutes of Kentucky not only provide a complete and, as we insist, exclusive remedy in cases of this kind, but they also furnish the same complete protection against any attempt on the part of the executor to collect and remove from the jurisdiction of Kentucky any assets belonging to the estate of his decedent, including debts owing to the estate. Furthermore, it appears from the record that this action was not begun until more than three years after the death of the decedent and that during all that time the executor had in his possession besides this stock in the garnishee company of the par value of $11,250, other assets more than sufficient to pay all the other creditors of the estate except the plaintiff (plaintiff's petition, record, p. 3; answer of garnishee, record, p. 7)—in other words, the estate was perfectly solvent. Hence the plaintiff during those three years had only to present his claim in the Wisconsin probate court in which the estate had been administered and prove the same, if it is susceptible of proof, in order to have it allowed and paid.

We have been at pains to make the foregoing accurate statement of the facts in this case because upon the actual facts in this case the argument of the appellant on this question of jurisdiction must necessarily fail. As we have pointed out in our principal brief and as stated by the court below (rec., pp. 23 and 24), the Kentucky Code of Practice, under which the plaintiff has attempted to proceed, does not on its face give a right of action against a foreign executor or administrator. But the appellant has endeavored by a lengthy and subtle chain of reasoning to show that in the light of former decisions of the courts of Kentucky such jurisdiction is to be read into the statute. In making this argument the appellant is confronted at the outset with the general and well-established rule of law that a foreign executor or administrator can

not be sued outside of the jurisdiction of the State in which he is appointed, a rule laid down by this court and announced in the decisions of many other courts, including the Court of Appeals of Kentucky, and as a general doctrine by Story in his Conflict of Laws, and in the American and English Encyclopædia of Law, all of which we have pointed out at length in our principal brief and which is also recited in the second opinion of the court below (rec., pp. 21 to 24).

An examination of the decisions relied upon by appellant shows that the only modification found in them of this general rule is that suit has been permitted against a foreign executor or administrator in another State than that in which he was appointed in a few special instances where he was actually present in such State and had in his possession, or there were at the time in the State subject to be reduced to his possession, assets which necessity seemed to demand should be subjected to the payment of the claims of creditors of the estate resident in that State. These decisions were very thoroughly and exhaustively reviewed by the court below in the second opinion (rec., pp. 18 to 22), and we feel that we can add nothing to what is there said. Upon that examination the court very justly says:

> "As to the weight of authority on this proposition it is stated in Minor Conflict of Laws, 236, that,
>
> "'If an administrator, appointed in one State, removes with the assets of the estate into another State, the courts are divided upon the question whether or not the decedent's creditors may sue the administrator in the latter State without a reappointment, the weight of authority seeming to favor the right of the creditors to sue. But if the administrator should only come into the State transiently or temporarily, the better opinion would seem to be that no action will lie against him there without a new appointment.'

"The ground upon which the right to sue the foreign executor in such a state of the case is based is necessity. As the foreign executor has removed to the State where suit is brought having wasted the assets collected in the foreign jurisdiction or brought them with him, if he can not be sued there he can not be sued at all. In the Virginia case Judge Tucker said:

"'Upon a full view of the whole subject I am of the opinion that justice, convenience and necessity require a recognition of the right to sue an executor who has qualified abroad if he comes within the jurisdiction bringing the assets with him.'

"The Kentucky case of Keiningham *v.* Keiningham, 71 S. W. 497, and the other Kentucky cases cited in the opinion in that case are all cases of the same sort; and Mr. Minor cites the cases of Atcheson *v.* Lindsey, 6 B. M. 86. Embry *v.* Miller, 1 Mar. along with others, as justifying his statement that the weight of authority is in favor of the right to sue in such a case.

"If necessity is the ground of suit in such a case the pendulum of authority might well swing to the other side if the executor sued is only transiently or temporarily within the State, as Mr. Minor states it has done. And, if such is the ground of the right to sue in such a case, authorities holding that a right to sue exists in such a case are not authorities in support of the contention here that a foreign executor or administrator may be sued in relation to assets located within the State where the suit is brought. For, in relation to such assets, no such suit is essential in order to reach them."

It is perfectly clear, as we have already pointed out, that no sort of necessity exists for disregard of the well-established rule which is here invoked by the appellee executor. The opportunity to prove and collect his claim had been open to the plaintiff for three years prior to the commencement of this action, and at the time that

the action was commenced if there had been any such property of the estate as he alleges in Kentucky, it could not possibly be taken therefrom to his prejudice by the executor, whilst the way was open to the plaintiff, by a method expressly provided in the statutes of Kentucky, to himself proceed to the subjection of such assets to the payment of his claim through administration in his own State.

Unwittingly the appellant has furnished the touchstone for the determination of his contention here in his attempt to meet the logic of the decision of this court in Vaughn *v.* Northrup, *supra*. On page 32 of appellant's brief the following quotation is made from Judge Story's opinion in that case :

> " Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It can not confer, as a matter of right, any authority to collect assets of the deceased in any other State; whatever operation is allowed to it, beyond the original territory of the grant, is a mere matter of comity, which every nation is at liberty to yield or withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he received under and in virtue of his administration to the proper tribunals of the government from which he derives his authority; and the tribunals of other States have no right to interfere with or to control the application of those assets, according to the *lex loci*."

And thereupon counsel proceeds to say :

> " The assets referred to here, ' which the tribunals of other States have no right to interefere with or to control,' are evidently meant assets *within the jurisdiction of the appointing government* and *not* assets within the jurisdiction of other States."

And the argument then proceeds upon the line which we have heretofore referred to, that the appellant is merely asking to subject to the payment of his claim assets of the estate within Kentucky and not within the jurisdiction of the State in which the executor received his letters testamentary, assets which the executor must go to Kentucky to collect; and that therefore this proceeding could not in any wise interfere with the assets of the estate within the jurisdiction having administration of the estate. Here is where the actual facts in this case confound appellant's argument. As we have already shown, this dividend which the appellant sought to attach was at the time actually and tangibly within the State of Wisconsin, and the liability of the Atwater & Allen Company to pay the same to the executor existed actually and incontestably at the time in Wisconsin, whilst on the other hand this liability to the executor could be said to have a *situs* in Kentucky only by the most strained legal fiction. Hence the result of the allowance of plaintiff's attachment proceedings would necessarily be to most essentially interfere with the assets "within the jurisdiction of the appointing government." Indeed when it is remembered that up to the time of the declaration of the dividend the stock of the garnishee company was and had been for more than three years actually in the possession of the executor and that the dividend, in effect, took the place *pro tanto* of that stock, the necessary effect of the attachment proceedings would be to directly interfere with property of the estate in the actual possession, to all intents and purposes, of the executor.

EDWIN C. BRANDENBURG,
Attorney for Appellees.

R. D. HILL and
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of Counsel.

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JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1904.

M. H. COURTNEY, *Appellant*,

v.

LOUIS A. PRADT, Executor of MERRIT B. ATWATER, deceased, and WILLIAM C. ATWATER. } No. 93.

Reply Brief of Appellees on Motion to Dismiss the Appeal.

EDWIN C. BRANDENBURG,
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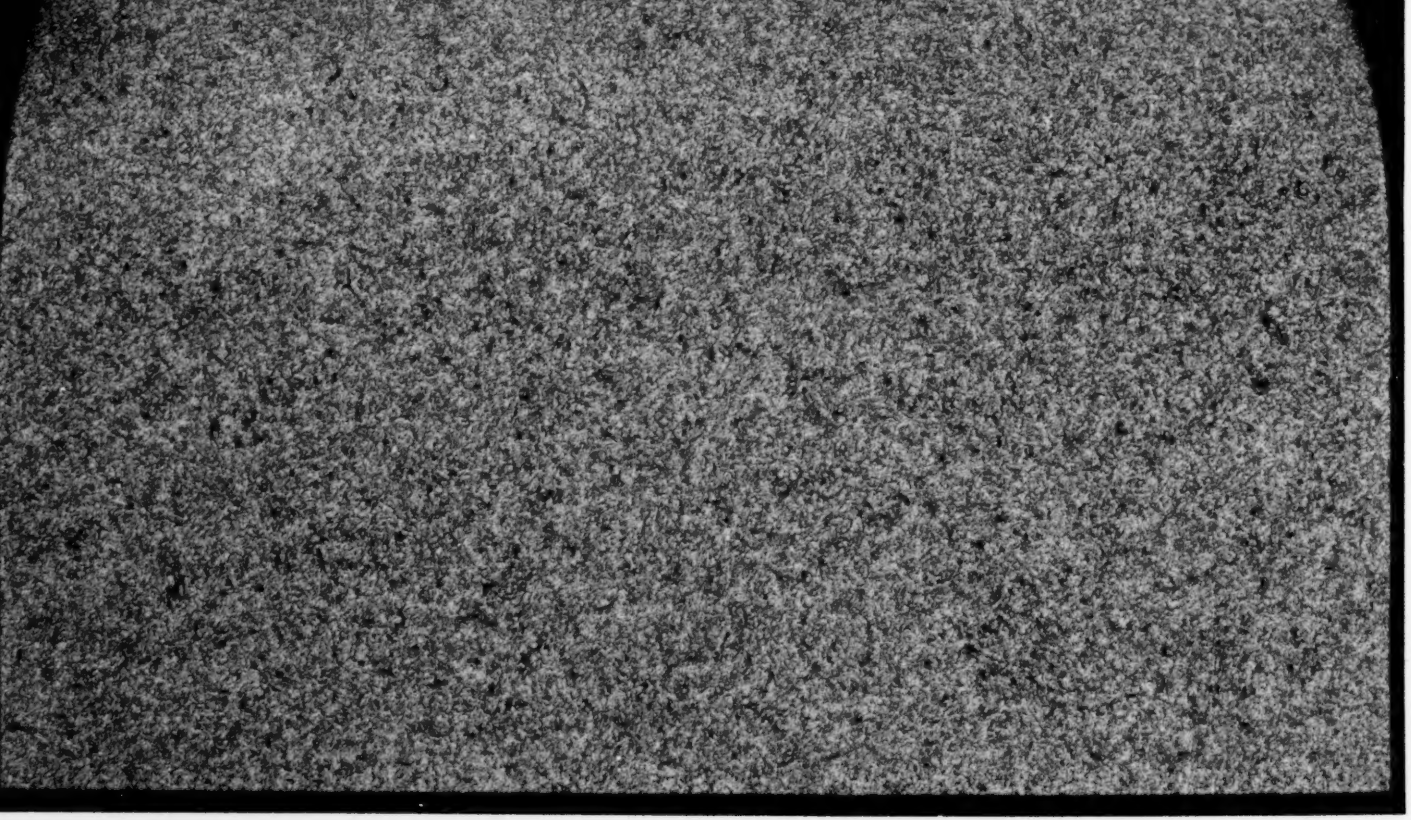

Supreme Court of the United States.

October Term, 1904.

M. H. COURTNEY, *Appellant*,
v.
LOUIS A. PRADT, Executor of MERRIT B. ATWATER, deceased, and WILLIAM C. ATWATER.
No. 93.

Reply Brief of Appellees on Motion to Dismiss the Appeal.

The discussion of this motion seems to have taken a wider range than we thought possible when we filed our original brief. The plaintiff's motion to remand the case, made before the Circuit Court, did not state the grounds for the motion. The motion was simply that the cause be remanded to the State court from whence it was removed. (See page 12 of record.) The motion might have been made upon various grounds, as that the removal was not had seasonably, or that the necessary diverse citizenship was not shown, or that the Federal court had no jurisdiction from the nature of the action, or because no jurisdiction was acquired by the State court. In fact the defendants' contention that the State court had no jurisdiction over the subject matter of the action or the person, gave the plaintiff the argument that there was no case in court at all, either in the State court or in the Federal court, and that therefore the Federal court had no jurisdiction to dismiss but should remand

and allow the State court to expunge its records; in other words, that there being no jurisdiction whatever, the record filed in the Federal court was a mere intrusion or impertinence. Consequently the motion to remand did not necessarily and by mere force of the motion itself raise a question of Federal jurisdiction. It did not inform the defendant or the court that a Federal question was the basis of the motion to remand.

In addition to the authorities we have already cited, we refer to the case of De Lima *v.* Bidwell, 182 U. S., 1. The action in that case was instituted in the State court of New York, a court of original jurisdiction, to recover duties paid under protest, against the United States revenue collector, and was removed to the Circuit Court of the United States on *certiorari*. In the Federal court the defendant appeared and demurred to the complaint, on the ground that it did not state a cause of action and that the court had no jurisdiction of the cause. The demurrer was sustained on both grounds, and the action dismissed. This court held, on appeal, that the defendant unquestionably had the right to show that the State court had no jurisdiction.

While in this De Lima case there are wide differences of opinion between members of the court upon other questions, we find no difference of opinion upon this question, and the doctrine that the question of jurisdiction of the State court to entertain the action may be raised in the Federal court upon a removal seems to be fully sustained.

In Sheldon *v.* Wabash R. Co. (C. C. Northern Dist. Ill.), 105 F. R., 785, the action was commenced in the State court and removed by the defendant to the Federal court. It was held that the jurisdiction of the Federal court in causes arising under the interstate commerce act was exclusive, and that a State court had no jurisdiction of

such causes. The judgment of the court was that the bill should be dismissed for want of jurisdiction in the State court to entertain it.

In Hummel *v.* Moore, 25 F. R., 380, the action was commenced in the State court and removed by the defendant under the act of 1875. The defendant filed an answer, claiming off-sets which exceeded the jurisdiction of the State court. The Federal court sustained the demurrer of the defendant. While this case is not strictly in point, in the opinion there is some discussion that may be valuable. The court said:

> "In all essential features the case is subject in this court to the limitations and restrictions which would have been applicable in the county court if it had not been removed into this court."

Elliott *v.* Shuler, 50 F. R., 454. This was a special proceeding by the plaintiff as administrator to sell the lands of his intestate to procure assets for the payment of debts, commenced in the Catawba County Superior Court of North Carolina, and removed to the Federal court by a non-resident defendant. There was a motion on the part of the plaintiff to remand to the State court, and a motion on the part of the defendants to dismiss the proceedings. The court said:

> "When there is a total absence of jurisdiction of the subject matter, a Federal court *sua sponte* or on motion of a party at any time will dismiss or remand a cause removed from a State court."

We believe the language of the learned judge in suggesting the remedy by remand is open to criticism in view of the later and better considered authorities.

In Tortat *v.* Hardin Mining & Manufacturing Co. (C. C. Dist. S. Dak.), 111 F. R., 426, where the cause was commenced in the State court and removed by the defendant

to the Federal court, a motion to remand was made by the plaintiff and a motion to dismiss by the defendant on the ground that there was no valid service of process.

In Wabash, &c., R. Co. *v.* Brow, 164 U. S., 271, the action was commenced in Michigan in the State court against a corporation which had no agent or property within the State of Michigan. The defendant appeared in the State court and filed its petition and bond for removal to the Federal court, and the record was duly sent to the Federal court. After the record was filed in the Federal court, the defendant appeared and specially moved the court to set aside the service of process and to dismiss the action for want of jurisdiction of the person of the defendant in the State court from which the cause was removed. The Federal court overruled this motion and a trial was had and judgment rendered against the defendant, under various exceptions taken by the defendant. The case came before this court on writ of error, and among the errors assigned was the refusal of the Circuit Court to grant the motion to dismiss. The court held that the defendant did not waive his right to object to the jurisdiction by applying to remove the cause, and cites with approval the language of Judge Drummond in Atchison *v.* Morris, 11 F. R., 582, as follows:

> "The party has a right to the opinion of the Federal court on every question that may arise in the case, not only in relation to the pleadings and merits but to the service of process; and it would be contrary to the manifest intent of Congress to hold that a party who has the right to remove a cause is foreclosed as to any question which the Federal court can be called upon under the law to decide."

In Goldey *v.* Morning News, 156 U. S., 518, the action was a personal action brought in the State court against

a corporation neither incorporated nor doing business within the State, and not having any agent or property therein, but service of the summons was attempted to be made upon the president, who was temporarily within the jurisdiction. The action was removed to the Federal court on the ground of diverse citizenship, and a motion made by the defendant to dismiss the action because of lack of jurisdiction, and the motion was granted. (See 42 F. R., 112.) This court held that the service of the process was void, and sustained the dismissal of the action. In dismissing the case the court said:

> "For the same reason, service of mesne process from a court of a State, not made upon the defendant or his authorized agent within the State, although there made in some other manner recognized as valid by its legislative acts and judicial decisions, can be allowed no validity in the Circuit Court of the United States after the removal of the case into that court, pursuant to the acts of Congress, unless the defendant can be held, by virtue of a general appearance or otherwise, to have waived the defect in the service, and to have submitted himself to the jurisdiction of the court."

The court said further:

> "The jurisdiction of the Circuit Court of the United States depends upon the acts passed by Congress pursuant to the power conferred upon it by the Constitution of the United States, and can not be enlarged or abridged by any statute of a State. The legislature or the judiciary of a State can neither defeat the right given by a constitutional act of Congress to remove a case from a court of the State into the Circuit Court of the United States, nor limit the effect of such removal."

And, again, this court said:

> "Although the suit must be actually pending in the State court before it can be removed, its removal

> into the Circuit Court of the United States does not admit that it was rightfully pending in the State court, or that the defendant could have been compelled to answer therein."

In Hawkins *v.* Pierce, 79 F. R., 452, the action was commenced in the State court and the defendant removed it to the Federal court. After the transfer of the cause to the Federal court, the defendant moved to set aside the sheriff's return, and dismiss the action for want of jurisdiction. The court dismissed the action.

See Martin *v.* B. & O. R. Co., 151 U. S., 673.

In Auracher *v.* Omaha & St. L. R. Co., 102 F. R., 1, the action was commenced in the State court and was removed upon petition by the defendant. The court sustained the motion to dismiss the action for lack of jurisdiction on the part of the State court to entertain the action.

See also Ferguson *v.* Ross, 30 F. R., 161.

This action is purely an action at law. It has no elements of an equity action. If it should be tried in Kentucky, it would be tried as an action at law and not as an action in equity. The ancillary process of attachment or garnishment obtained by the plaintiff may be in form equitable. It may be that the Kentucky statutes mold it into a creditor's proceeding, to subject assets to the payment of whatever indebtedness shall be found due in the principal action upon final judgment. But this ancillary process is dependent upon the principal action. The plaintiff seeks to derive jurisdiction through this process instead of by service of process in the principal action. This merely incidental proceeding, designed to secure satisfaction of whatever judgment is ultimately rendered, does not change the nature of the action itself, nor are the statutes of Kentucky to the contrary. They formulate these proceedings, recognizing fully the true

nature of the action brought here as an action at law. This ought to dispose of the contention of counsel that that action is an equitable action, which the Federal court, by reason of fundamental inability, can not entertain jurisdiction of, and the attempt of counsel to liken the case to that of Cates, 149 U. S., 451, is without point.

The nature of this action brings it clearly within the removal statutes, and this right of removal can not be qualified by the fact that the ancillary remedy of attachment of assets is molded by the Kentucky statutes, into the form of a bill in equity rather than a writ at law. That would be to deprive the defendants in this case of all benefits of the right of removal, and that, too, in a case of a nature such as is unquestionably cognizable by the Federal court to which it was removed. As we have said, the statutes of Kentucky do not attempt nor purport to abridge this jurisdiction of the Federal court, and if they did, to that extent they would be inoperative. (See Goldey *v.* Morning News, 156 U. S., 523, already cited herein.)

> "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence, and to which all who were non-residents or aliens might resort for legal redress. (Gordon *v.* Longest, 16 Pet., 104.)"

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Attorney for Appellees.

R. D. HILL and
NEAL BROWN,
of Counsel.

Additional authorities:
Dillon on Removal - Sec. 201-2
Cook on Stocks &c - " 543.
Black on Pub. Corp. " 604.
Bank of Louisville v. Gray. 84 Ky.
2 Woerner, Admr - Sec. 364.

Supreme Court of the United States.

No. 93.—October Term, 1904.

M. H. Courtney, Appellant, *vs.* Louis A. Pradt, Executor of Merrit B. Atwater, deceased, and William C. Atwater.	Appeal from the Circuit Court of the United States for the Eastern District of Kentucky.

[January 3, 1905.]

Merrit B. Atwater, a citizen of Wisconsin, and William C. Atwater, a citizen of Illinois, were partners, and in 1898 Merrit B. died testate, having appointed Louis A. Pradt, likewise a citizen of Wisconsin, his executor. The will was duly admitted to probate in Wisconsin, and Pradt duly qualified as executor, and has been and is acting as such. William C. Atwater was one of the legatees under the will.

The Atwater Land and Lumber Company was a corporation of Wisconsin, engaged in buying, owning, holding and selling real estate in Kentucky, and Merrit B. Atwater, at the time of his death, owned stock in that corporation, on which a dividend was declared August 30, 1901, which amounted to $4,757.37. W. C. Atwater was not a stockholder at the time of the declaration of the dividend, and had not been since 1893.

Courtney, a citizen of Kentucky, brought suit in the Circuit Court of Powell County, Kentucky, against Pradt, executor, and William C. Atwater, and procured a general order of attachment, under which the sheriff summoned the company to answer as garnishee by delivery of a copy of the attachment to the person designated by the company as its agent upon whom process could be executed, as required by the statutes of Kentucky in that behalf. There was no personal service on Pradt, executor, or on William C. Atwater, but a warning order was entered pursuant to statute.

Pradt, as executor, and William C. Atwater, filed their petition and bond in the State court for the removal of the cause to the Circuit Court of the United States for the Eastern District of Kentucky on the ground of diversity of citizenship, and it was removed accordingly. Pradt, executor, and William C. Atwater, entering their appearance in the Circuit Court for that purpose only, moved the court to dismiss the case "for want of jurisdiction to try same." On the same day, Pradt, executor, filed a special demurrer, assigning as causes, *inter alia*, that the court had no jurisdiction of the person, or of the subject matter. And on that day plaintiff moved to remand, no reasons being given. The Circuit Court overruled the motion to remand, sustained the motion to dismiss and the

demurrer, and entered judgment dismissing the suit for want of jurisdiction. Two opinions were delivered, because further argument was permitted, and both are in the record. No certificate of the question of jurisdiction was applied for or granted; but an appeal was allowed to this court, which was argued in due course, together with a motion to dismiss.

Mr. Chief Justice FULLER delivered the opinion of the Court:

It appears from the opinions of the Circuit Court, to which we properly may refer, *Loeb* v. *Trustees*, 179 U. S. 472, that the court held that the State court had no jurisdiction so far as William C. Atwater was concerned unless it had jurisdiction as against the foreign executor of his deceased partner; that the suit must be treated as if against the foreign executor alone; and that it could not be maintained against the foreign executor in the State court, nor in the Federal court. And further that the court was not bound to remand the case that the State court might determine that question.

The appeal was taken directly to this court, and cannot be maintained unless the case comes within the first of the classes named in section five of the judiciary act of March 3, 1891, which gives an appeal or writ of error direct "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

It is settled that the question of jurisdiction thus to be certified is the jurisdiction of the Circuit Court as a court of the United States, and not in respect of its general authority as a judicial tribunal. *Blythe* v. *Hinckley*, 173 U. S. 501; *Mexican Central Railway Company* v. *Eckman*, 187 U. S. 429; *Louisville Trust Company* v. *Knott*, 191 U. S. 225; *Bache* v. *Hunt*, 193 U. S. 523.

And the general rule is that the certificate is an absolute prerequisite to the exercise of jurisdiction here. *Maynard* v. *Hecht*, 151 U. S. 324. Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as equivalent to the formal certificate. *Huntington* v. *Laidley*, 176 U. S. 668; *Arkansas* v. *Schlierholz*, 179 U. S. 598.

But, as said by Mr. Justice Gray in *Huntington* v. *Laidley*, "the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction," that is, of the jurisdiction of the court as a court of the United States.

No such state of case is exhibited by this record. There is no certificate nor any equivalent therefor. No single and definite issue as to the jurisdiction of the Circuit Court as a Federal court is presented.

The case was dismissed for want of jurisdiction over it, as a suit against a foreign executor, in the courts of Kentucky. The court had power to so

adjudicate. When a case has been removed into the Circuit Court on the ground of diversity of citizenship, that court is entitled to pass on all questions arising, including the question of jurisdiction over the subject matter in the State courts; or the sufficiency of the service of mesne process to authorize the recovery of personal judgment. *Goldey* v. *Morning News*, 156 U. S. 518; *Railway Company* v. *Brow*, 164 U. S. 271; *De Lima* v. *Bidwell*, 182 U. S. 1; *Conley* v. *Mathieson Alkali Works*, 190 U. S. 406. It is true that in this case a motion to remand was made, but there was nothing to indicate that it rested on the contention that there was a lack of jurisdiction in the Federal courts as contradistinguished from the State courts. It did not in terms put in issue the power of the Circuit Court as a court of the United States to hear and determine the case, and we cannot be called on to say that there may not have been other grounds for the motion, or to attempt to eliminate every other ground for the purpose of bringing the case within the first clause of section 5.

We do not regard the objection now urged that the suit was in equity, and as such not cognizable by the Circuit Court as open to consideration on this record by direct appeal, but if it were, it is unavailing on the question of power.

The principal action was an action at law. If under existing statutes of Kentucky the process of attachment or garnishment against non-residents was equitable in form, as is contended, this could not cut off the right of removal where diversity of citizenship existed. The right to remove given by a constitutional act of Congress cannot be taken away or abridged by State statutes, and the case being removed, the Circuit Court had power to so deal with the controversy that the party could lose nothing by his choice of tribunals. *Cowley* v. *Northern Pacific Railroad Company*, 159 U. S. 569. In our opinion the appeal was improvidently prosecuted directly to this court, and it must, therefore, be

Dismissed.

True copy.

Test:

Clerk Supreme Court, U. S.